

Prairie First Nations and Provinces:
Is there a Fiduciary Relationship that gives rise to Fiduciary Obligations?

A Thesis Submitted to the College of Graduate Studies and Research in Partial
Fulfilment of the Requirements for the Degree of Master of Laws in the
College of Law University of Saskatchewan
Saskatoon, Saskatchewan

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March 2001

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ABSTRACT

This thesis examines the relationship between the provincial Crown and Aboriginal peoples in the particular context of the prairie provinces to determine whether or not it can be described as fiduciary and, if so, what obligations arise from it.

While very few judicial decisions have dealt with this specific issue, an analysis of the existing jurisprudence suggests that there are two types of fiduciary relationships in which Aboriginal peoples are involved. The first type is a manifestation of the more traditional fiduciary concept. It is similar to classic fiduciary situations, such as doctor/patient, director/corporation, partner/partner, in which a fiduciary having control over the property or person of another must act in that other person's best interests. In the Aboriginal context, the power of the federal Crown over surrendered Indian reserve lands and over Indian moneys is limited by its fiduciary obligations of this traditional type. The second type is unique to the situation of Aboriginal peoples. It arises out of the constitutional protection provided to Aboriginal and treaty rights and gives rise to obligations that limit the jurisdiction of federal and provincial governments over them.

This thesis concludes that the provincial Crown in the prairie provinces possesses no fiduciary obligations arising directly out of its relationship with First Nations peoples, in the classic fiduciary sense, because history and the Constitution have established that that relationship is with the federal Crown. Provincial fiduciary obligations are limited to those arising from the constitutional protection of Aboriginal and treaty rights and thus arise only in respect of constitutionally valid provincial laws that infringe on such rights. In Saskatchewan, the only infringing provincial laws that are possible are those made under the authority provided by paragraph 12 of the *Natural Resources Transfer Agreement, 1930*, which authorizes Saskatchewan to make limited laws relating to hunting, fishing and trapping applicable to Indians.

ACKNOWLEDGMENTS

I wish to acknowledge all of those who made this work possible in many and various ways. While the list is, as always, too long to enumerate everyone, some individuals stand out in their assistance to me in this project.

I wish to thank, in particular, the members of the Faculty of the College of Law at the University of Saskatchewan and my fellow students, and the Faculty of Graduate Studies and Research at the University of Saskatchewan. I would especially like to thank Professor Donna Greschner, who has been much more than just a thesis advisor to me and for whose guidance and support I am extremely grateful.

I also would like to express my gratitude to Dr. John Whyte, Q.C. who suggested the general subject matter of this thesis as one deserving of exploration. I have been greatly intrigued and intellectually stimulated by the effort to understand the essential character of the fiduciary concept in this particular context, and I have experienced the personal satisfaction that is derived from a sense of having solved a great puzzle – or at least an aspect of one.

Most of important of all, I would like to thank the people close to me – the people I work with and the members of my family. They have had to put up with my involvement in this great task, not only for the time that it has taken that I might have devoted to other things, but for their forbearance of my tendency to subject them to every detail of my thinking on a subject in which I realize they have had much less interest than have I.

In this category, I extend my thanks in particular to my partner in the practice of law, Garrett Wilson Q.C., who has been very supportive of this effort, despite its immediate impact on the billable hour.

Finally, I would like to thank my husband, Aydon Charlton, and my children, Zena, Ciara and Kai, who have been unwavering supporters, never questioning and always supportive of the choices I have made in pursuing my educational goals. Kai may not recognize a mother who is not working on a university degree, since I struck out on this path before he was born and am only now coming to its end.

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CHAPTER 1

INTRODUCTION

In 1691, Henry Kelsey, a British explorer, became the first white man to set eyes on the Saskatchewan River.¹ Less than 25 years later, in 1713, the Imperial English Crown had entered into the first of the peace and friendship treaties with Aboriginal peoples.² Not long afterwards, in 1726, the Chancery Court rendered its decision in what has become the leading case establishing the idea that fiduciary obligations arise out of fiduciary relationships.³ However, while the relationship between the Crown and Aboriginal peoples was initially established at about the same time as was the judicial recognition of the fiduciary concept in English law, it was not until more than 250 years later, in 1984, that the Supreme Court of Canada determined that the fundamental nature or character of this relationship

¹Marjorie Wilkins Campbell, "The Saskatchewan", in Dennis Gruending, ed., *The Middle of Nowhere: Rediscovering Saskatchewan* (Saskatoon: Fifth House Publishers, 1996) 8 at 9.

²The first of the peace and friendship treaties was entered into in what is now Canada at Saint John River, N.B., according to B. Wildsmith, "Pre-Confederation Treaties," in B. Morse, ed. *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1991) at 122. The first such treaty in North America was at Massachusetts Bay in 1693.

³*Keech v. Sandford* (1726), Sel. Cas. T. King 61, (1726) 25 E.R. 223. The case involved a dispute between an infant and the trustee of the estate of the infant's deceased father. The trustee had personally taken a lease of certain of the infant's property, when no other lessee was available. His intentions were honourable, but the court held that he had breached a fundamental fiduciary obligation of all trustees to avoid putting themselves in a position where their personal interests and their fiduciary duties could be in conflict.

between the Crown and Aboriginal peoples was fiduciary.⁴

A fiduciary relationship is one in which the fiduciary, who is the party in the relationship in a position of power, is obliged to exercise that power on behalf and for the benefit of the other party, who is known as the beneficiary. It is this power in the hands of the fiduciary and powerlessness in the hands of the beneficiary, and the undertaking of the former to act on behalf of the latter, that is at the core of the fiduciary construct. Not surprisingly, then, the fiduciary construct is one that arises in equity, and equity holds the fiduciary to a very high standard of conduct.⁵ As a result, duties, called fiduciary obligations,

⁴ The case was *Guerin v. R.*, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481 [hereinafter *Guerin* cited to W.W.R.].

⁵ According to Lord Herschell in *Bray v. Ford*, [1896] A.C. 44 at 51 (H.L.):

It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.

This inflexibility has its origins in the judgment of the Lord Chancellor in *Keech v. Sandford*, *supra* note 3 (as quoted in *Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.*, (1997), 198 A.R. 241, at para 93 (Q.B.) [hereinafter *Terra Energy*]):

I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to cestui que use; though I do not say there is a fraud in this case, ***yet he should rather have let it run out, than to have had the lease to himself.*** This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed. [emphasis added]

arise out of such relationships. The precise nature and scope of those obligations varies with the relationship out of which they arise.⁶ In the case of the fiduciary relationship between the Crown and Aboriginal peoples, the judicial definition of the fiduciary obligations arising out of it has been slowly occurring since 1984, as cases come before the Supreme Court of Canada in which fiduciary claims are advanced by Aboriginal peoples.

⁶In *Terra Energy, ibid*, the plaintiff argued that the existence of a fiduciary relationship is not a necessary prerequisite to finding that one party in a relationship owes the other party a fiduciary obligation. The trial judge, Mr. Justice Cairns said, in this regard, at para. 103:

After considering a vast body of case law and academic articles I cannot agree with the Plaintiff's novel characterization of the law. ***It is trite law that fiduciary obligations and duties can only arise as an incidence of a fiduciary relationship.*** [emphasis added]

This principle was confirmed by the Alberta Court of Appeal, [1999] 6 W.W.R. 483, at para. 26, which stated:

The law with respect to the fiduciary principle, although in a state of evolution, has constantly held that fiduciary obligations arise out of fiduciary relationships.

(An application for leave to appeal this case to the Supreme Court of Canada was dismissed with costs, [1999] S.C.C.A. No. 316.)

Professor Robert Flannigan argues for a greater emphasis on the functions performed by the fiduciary rather than the particular class of relationship involved. His approach identifies common threads that connect various categories of fiduciaries, and is a useful means for examining the nature of the specific obligations that arise out of the fiduciary relationship. It is these functions that give the fiduciary power over the beneficiary's property or person and it is because the fiduciary wields this power that fiduciary obligations arise. However, his argument calls for an analysis of the components of the relationship, not for abandoning the connection between the relationship, and the power it provides to the fiduciary, and replacing the requirement for the relationship with free-floating obligations. See "Fiduciary Regulation of Sexual Exploitation", *The Canadian Bar Review*, Vol. 79 No. 3, 301-314 at 307-308.

To date, most of the cases decided in the Supreme Court of Canada that deal with the issue of the fiduciary obligations of the Crown, do so in the context of the justification of federal laws that interfere with Aboriginal rights.⁷ In that context, the fiduciary relationship produces an obligation that acts as a restraint or limit on the exclusive legislative jurisdiction provided to Parliament under s. 91(24) of the *Constitution Act, 1867* to make laws in relation to “Indians”⁸ and their lands. This limitation results because, since the Aboriginal and treaty rights of Aboriginal peoples are recognized and affirmed by the constitution, Parliament cannot be permitted the whimsical control over them that s. 91(24) might otherwise be taken to suggest.⁹ Equity, therefore, provides the necessary brake on that strictly legal power and, originally in the absence of politics,¹⁰ secures the larger goal of

⁷See, for example, *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410 [hereinafter *Sparrow* cited to W.W.R.], *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; By contrast, *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] 4 W.W.R. 457 [hereinafter *Badger*], deals with the infringement of a treaty right by provincial legislation enacted under the constitutional authority of the *Natural Resources Transfer Agreement*. A number of decisions mention the fiduciary relationship but do not provide any analysis of it.

⁸I use the term “Indian” because that is the language of s. 91(24). Throughout this thesis I use “Indian” when I am referring to the s. 91(24) context.

⁹“Whimsical” in the sense that the federal government takes the position that it can exercise jurisdiction under s. 91(24), or not, as it chooses.

¹⁰Politics was not available to Aboriginal peoples who were powerless and kept that way through the assimilationist policies of Canada's first century. From its first enactment as a consolidation and expansion of all laws relating to Indians in 1876, until 1951, the *Indian Act* prohibited Indians from setting foot off the reserve without the permission of the local Indian agent; Indian bands were prohibited from hiring lawyers to pursue their claims; Indians could not vote (until 1960), serve in combat, or get an education, without ceasing to be “Indian”. Since the Crown took to itself control over Indians and their lands and since it persisted in policies that perpetuated dependence, including withholding the right to vote,

justice or fairness for Aboriginal peoples within the Canadian community. As the Supreme Court of Canada said in *R. v. Sparrow*, "federal power must be reconciled with federal duty".¹¹

The reconciliation to which the Court was referring is the reconciliation of exclusive federal power with constitutionally-protected rights. According to the Court, the existence of s. 91(24) implies that the Aboriginal and treaty rights protected by s. 35 of the *Constitution Act, 1982* are not absolute. If not absolute, these rights can be infringed, but, because of the fiduciary duty, they may only be infringed where the infringing legislation can be justified. For this reason, the Crown must prove that the infringing legislation seeks to secure valid legislative objectives in a manner that minimally impairs the protected right and by the use of a process that provides an opportunity for the holders of the right to have input into the legislative initiative, so as to allow them their preferred means of exercising their rights. This notion of reconciliation of power and duty is the first hint in the jurisprudence that fiduciary obligations can only exist where the Crown wields legislative power in relation to Aboriginal peoples.

it was not possible for a political dynamic to develop. And, throughout the treaty-making period on the prairies, as the herds of bison declined, the federal government regularly used the method of withholding rations from a starving people as a means of "bringing the people into line". (See Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992) at 300.) The fiduciary construct in this context is, in many respects, a substitute for the practical limitations on strictly legal power that a political dynamic provides.

¹¹*R. v. Sparrow*, *supra* note 7 at 435.

Critics of this reasoning argue that rights that are constitutionally recognized and affirmed ought to be absolute. They point to the fact that s. 35, which provides for this recognition and affirmation, falls outside the Charter portion of the *Constitution Act, 1982*, which is explicitly subject, by virtue of s. 1, to reasonable limits prescribed by law that can be demonstrably justified. If Charter rights are thus explicitly circumscribed, then, the argument goes, the lack of such explicit limitation surrounding the rights described in s. 35, as part of the same legislative document as the Charter, suggests that those rights are indeed absolute.

However, the Court has turned that argument around, saying that the continued existence of s. 91(24) after the enactment of s. 35 is effectively a specific limitation. In other words, the explicit language of s. 1 of the Charter was not necessary in relation to s. 35 because sufficiently explicit language was already present in s. 91(24). If Parliament retains authority to legislate in relation to "Indians and Indian Lands", it must be, then, the argument goes, a power with some substantive content.

While it must be accepted that one provision of the constitution cannot be interpreted so as to nullify another, the necessary reconciliation between s. 35 and s. 91(24) is also possible by finding that s. 91(24) reserves to Parliament the power to make laws in relation to Indians and their lands, but only if those laws do not impair their constitutionally protected rights. The Court has apparently concluded, however, that the collective rights protected by s. 35 ought to receive no greater deference than the individual rights protected by the

Charter.

The concept of immutable rights, at least in the possession of individuals in society, seems something of an anathema to Anglo-Canadian jurisprudence. The Canadian Charter establishes individual rights only as presumptive, always subject to the greater interest of the collective public good over that of the individual. In some respects, the existence of s. 1 of the Charter permits Canadian judges to be more honest than their American counterparts in that the finding that a Charter right has been infringed does not necessarily result in the infringing law being struck down; it merely moves the discussion to a different question: is there a greater public good being served by the infringing law to which individual rights ought to be sacrificed? The rights protected by s. 35, however, are collective rights, and the balancing that must occur in this context is not just between the claims of individuals as against the public good, but also between the claims of one segment of Canadian society as against others.

In the s. 35 context the establishment of a fiduciary relationship provides a convenient vocabulary for reconciliation of two apparently disparate, and even contradictory, portions of the constitution. But, the fiduciary relationship is not essential to that analysis. The mere fact that s. 91(24) and s. 35 exist together requires a reconciliation, whether or not it is fiduciary, that inevitably will result in limitations on the exercise by Parliament of legislative authority under s. 91(24). The fiduciary path of reconciliation that the Court has chosen has limited both parliamentary authority and the scope of the constitutional protection of s. 35

rights. And it has at least one other consequence as well: inexorably, one must conclude that the fiduciary relationship is itself rooted in the constitution.

Thus the Court has held that the entrenchment of Aboriginal and treaty rights through their constitutional protection requires that the apparently unfettered federal power to legislate affecting Aboriginal peoples and their lands must be limited or controlled when the exercise (or arguably even non-exercise¹²) of federal power infringes unjustifiably on those rights. The corollary is also true: existing Aboriginal and treaty rights, although constitutionally recognized and affirmed, may be interfered with by laws that can be justified.

However, the question posed originally in *Guerin* was the question of how the Crown's conduct, other than as manifested in the enactment of legislation, can be measured against the fiduciary standard that *Guerin* declared to exist. In response to this question, the Supreme Court of Canada has only considered three cases since its decision in *Guerin*.

In the case of *Ontario (Attorney General) v. Bear Island Foundation*¹³, the plaintiff Indian Band claimed that it retained a right of possession to a large tract of land in Ontario,

¹²I first wrote these words in a preliminary draft prepared in July 1997. Subsequently, what seemed to many (and perhaps still does) a far-fetched notion was accepted by the Supreme Court of Canada in its decision in the reference cases relating to the remuneration of *Provincial Court Judges*, [1997] 3 S.C.R. 3. There the court held that legislatures must enact a particular type of legislation relating to the determination of judges' salaries in order to preserve their judicial independence.

¹³[1991] 2 S.C.R. 570, [1991] 3 C.N.L.R. 79.

based on its Aboriginal title to the land. The Court held that an Aboriginal title in the land had indeed existed, but it had been extinguished when the Band adhered to the Robinson-Huron Treaty of 1850. However, as the Court stated:

It is conceded that the Crown has failed to comply with some of its obligations under this agreement [the Robinson-Huron Treaty of 1850], and thereby breached its fiduciary obligations to the Indians.¹⁴

In *R. v. Lewis*¹⁵, the Aboriginal plaintiffs claimed that the Crown breached its fiduciary obligations by failing to include a fishery within the boundaries of a particular reserve. The court held that "any fiduciary obligation on the part of the Crown [that may have existed] to secure access to the fishery . . . was honoured by providing fishing stations"¹⁶ for the plaintiffs' use. Neither of these cases entered into any detailed analysis of the fiduciary relationship or the obligations flowing from it, other than to assert that they both existed.

¹⁴*Ibid* at para. 7. Some commentators argue that because the provincial Crown was the party to this litigation that the case implicitly acknowledges provincial fiduciary obligations, when it said at para. 7, "It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians. These matters currently form the subject of negotiations between the parties." The "parties" to the litigation included only the provincial Crown. Of course, the reason for this was that the Bear Island Foundation had, on behalf of the Temagami Band of Indians, registered cautions or caveats against a large tract of land in Ontario on the basis that its Aboriginal title had not been surrendered. The province initiated the litigation to have the cautions removed, but engaged in negotiations, which ultimately failed.

¹⁵[1996] 1 S.C.R. 921, [1996] 5 W.W.R. 348.

¹⁶*Ibid* at para. 52.

In the case of *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*¹⁷ the court established an intention-based approach to determining questions of fiduciary failure in the case of surrender of reserve lands, although, paradoxically, it didn't attempt to place that approach in the fiduciary context.¹⁸ It also held that the failure by federal authorities to rectify an error in a transfer of surrendered land that inadvertently included mineral rights, when they had the power to do so under the *Indian Act* at the time, was a breach of the Crown's fiduciary obligations (raising the question of whether Parliament's *failure* to legislate to *provide* the legal power to do so would have also been a breach of its fiduciary obligations). On the other hand, the *Apsassin* decision accepts unquestioningly the application of a legislated limitation period, without asking whether the fiduciary obligations of the Crown might prevent Parliament from enacting limitations legislation at all in relation to cases of its own fiduciary breaches.¹⁹

¹⁷[1995] 4 S.C.R. 344 [hereinafter *Apsassin*].

¹⁸The idea of looking to the intention of the Indians involved has the superficial allure of deference to their wishes, but may in fact be an approach that results in the acceptance of decisions and actions by the Crown as fiduciary that are contrary to the interests of the Indians as the beneficiary in the fiduciary relationship. Normally, one would understand such conduct to be a breach of fiduciary duty. In fact, in any other fiduciary relationship the fiduciary has no obligation to defer to the wishes of the beneficiary; the fiduciary obligation is to act in the beneficiary's best interests, whether or not that corresponds to the beneficiary's wishes. Of course, the fiduciary relationship with Aboriginal peoples is also described as *sui generis*, and in that sense, it appears that this is one of the unique characteristics of this particular fiduciary relationship.

¹⁹It does seem somewhat anomalous that Parliament might apparently enact legislation to limit its fiduciary responsibilities, although presumably the validity of limitations legislation must lie in its general application. There is also the question of whether or not a limitations period in effect extinguishes a right, and if so, does it indicate a "clear and plain" intention, and is it enacted by Parliament?

So far, then, we know only that:

- a fiduciary relationship exists;
- Parliament's power to enact laws under s. 91(24) is limited by fiduciary obligations that arise out of that relationship to act in the best interests of Indians when legislating (and perhaps when not legislating) in relation to them;
- a breach of a treaty obligation is a breach of a fiduciary obligation;
- in determining the best interests of Indians, it is necessary to look at their intentions; and
- the Crown must have access to all avenues available to it to rectify lapses in its conduct as a fiduciary.

However, to date there have been no cases in the Court that specifically address the question of the role of Canadian provinces in the fiduciary context.²⁰ It is in this context that the fundamental question explored by this thesis arises: that is, since fiduciary obligations are

²⁰There are, however, three cases where provincial laws were at issue. In one of these, the Quebec case of *R. v. Côté*, [1996] 3 S.C.R. 139, the court found that no Aboriginal right had been infringed. The other two cases, *R. v. Sundown*, [1999] 2 C.N.L.R. 289, and *R. v. Badger*, [1996] 1 S.C.R. 771, involved provincial hunting laws enacted under the authority of the *Natural Resources Transfer Agreements, 1930*. It is the contention of this thesis that the jurisdiction of the prairie provinces under those agreements is the one narrow area in which they have jurisdiction, and therefore power, over Indians, so as to engage the justification requirement of s. 35 based on the reconciliation of power and duty that the fiduciary construct requires. However, in any other context, a provincial law that is "in relation to" Indians or their lands is *ultra vires* the province, and void or inoperable on that account. It should also be noted that laws of general application that are made applicable to Indians by virtue of s. 88 of the *Indian Act*, are federal laws, although they incorporate provincial laws by reference.

not free standing but arise out of fiduciary relationships, is there a fiduciary relationship between provinces and Aboriginal peoples and, if so, what fiduciary obligations might it give rise to?

Several academic writers have made the point that the concept of the divisible Crown – that is, the idea that the Crown may exist as sovereign in different forms, such as federal and provincial -- is a reasonably recent one. They go on to argue that, in treating with the Crown, Aboriginal peoples have not been, or ought not to be, required to sort out which manifestation of the Crown is the one with which they should be dealing.²¹ Thus, they argue, when the Crown in Canada chose to divide itself, this did not alter the Aboriginal understanding of the Crown, and, consequently:

Individual components of the whole of the Canadian Crown's duty attached to either the federal or provincial Crowns in a manner reflective of the division and distribution of powers, responsibilities, and benefits under the British North America Act, 1867.²²

The divisible Crown is a necessary construct of federalism, where legislative authority and thus sovereignty is parcelled out between federal and provincial governments. Aboriginal peoples ought not to be expected to sort out which manifestations of the Crown with which they should be dealing because they should be able to rely on *any* manifestation

²¹See, for example, Brian Slattery, "First Nations and the Constitution: A Question of Trust", (1992) *Canadian Bar Review*, Vol. 71, No. 2, 261 - 293 [hereinafter "A Question of Trust"] and Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 244-254.

²²Rotman, *ibid* at 250.

of the Crown to treat with them fairly and honourably. It is difficult to assume that either the federal or a provincial Crown would deal with Aboriginal peoples (or others for that matter) knowing or believing that it could not keep the promises it made. But, this merely begs the more fundamental question of the nature of the relationship between Aboriginal peoples, as such, with a provincial Crown.

In a fiduciary relationship, the fiduciary has the power to affect the beneficiary through the fiduciary's power to make unilateral decisions; the power to make unilateral decisions cannot be claimed to exist because the provincial Crown is a fiduciary. However, since provinces have no authority to legislate in relation to Aboriginal peoples as such, they have no unilateral power that they can wield over them in a manner sufficient to ground the existence of a fiduciary relationship. This merely logical observation is borne out as well by historical events, at least on the prairies. The result of an analysis of the relationship in other provinces may be different.²³

²³In Ontario, for example, the agreement between Canada and Ontario that was entered into in 1894, and implemented by complementary federal and provincial legislation, as a means of settling the disputes between the two governments that were taken to the courts in a series of cases beginning with *St. Catherine's Milling* in 1888, provides Ontario with a place in all subsequent treaty negotiations in that province. Ontario has apparently interposed itself in the treaty relationship and may well have unilaterally assumed obligations of a fiduciary nature in much the same way as did George III when he unilaterally took on the role of protector through the promulgation of the Royal Proclamation. Perhaps this is also an element of the Supreme Court's decision in *Paul v. C.P.*, [1988] 2 S.C.R. 654, where both Canada and New Brunswick had legislatively confirmed and approved the location of a railway that crossed an Indian reserve. And, of course, it is this unilateral intrusion into matters affecting Aboriginal peoples that is at the heart of the British Columbia Supreme Court's declaration in *Gitanyow First Nation v. Canada*, [1999] B.C.J. No. 1258, that fiduciary obligations can be owed by the provincial Crown. In that case, the provincial government had agreed to negotiate treaties with Aboriginal peoples and was being sued,

The question also arises of whether or not the fiduciary relationship that originally developed between Aboriginal peoples and the Imperial Crown at and since the time of contact is contained in s. 91(24) independent of s. 35, or in the constitution at all. Some academic writers presuppose a constitutional "home" for the relationship, but assume that it follows the division of powers.²⁴ *Guerin* declared the fiduciary relationship to exist without regard to s. 35. Furthermore, as we shall see, the fiduciary cases clearly establish the essential character of a fiduciary relationship as one in which power can be wielded by the fiduciary in a context in which the beneficiary is particularly vulnerable. It follows that since s. 91(24) is the constitutional locus of power in relation to Aboriginal peoples, it must also be the constitutional locus of the relationship, and hence the obligations that arise out of it. This conclusion also accords with the Supreme Court's description in *Sparrow* of the need to reconcile power and duty.

Brian Slattery describes the division of powers in the constitution as being itself a

along with the federal government, for a failure to negotiate in good faith. The court rejected the argument, made on a preliminary motion by the province that, because it was a province, it had no fiduciary obligations to Aboriginal peoples. This, too, may be a fiduciary obligation that is triggered by the unilateral undertakings on the part of the provincial Crown to engage in the modern treaty negotiations. That is, once a province determines to treat with the Indians, it cannot, dishonour the Crown it represents by reneging on its promise. However, what these various situations illustrate is that, just as in any other fiduciary context, the nature of the specific relationship is what gives rise to specific fiduciary obligations.

²⁴For example, Slattery and Rotman. I use the term "home" as opposed to a word like "source". There is no doubt that the relationship pre-dates Confederation and is rooted in history and the fact that the Crown took to itself the obligation of protecting Indians from dispossession by Europeans (while conveniently protecting the Crown's own sovereignty).

"fiduciary structure".²⁵ However, his description is contained in the development of his theory of the constitutional trust, and from this perspective, the trust, and the fiduciary obligations that flow from it, are not limited to Aboriginal peoples. In this context, all governments are constrained in their exercise of power to govern "for the welfare of the people". This broader sense of the constitutional trust is not likely to result in specific legal obligations that can be enforced in courts. To put it another way, in this sense, Aboriginal peoples have no greater claim on any government than do any other citizens of Canada. Nevertheless, Slattery certainly posits that while "the trust relationship attaches primarily to the Federal government,"²⁶ it attaches also to the provincial Crown because:

The rearrangement of constitutional powers and rights accomplished at Confederation did not reduce the Crown's overall fiduciary obligations to First Nations. Rather, these obligations tracked the various powers and rights to their destinations in Ottawa and the provincial capitals. Since section 91(24) of the Constitution Act, 1867 makes the Federal government responsible for "Indians and Lands reserved for the Indians", the main burden of the trust clearly falls on its shoulders. However, *so long as the Provinces have powers and rights enabling them to affect adversely Aboriginal interests protected by the relationship, they hold attendant fiduciary obligations.*²⁷ [emphasis added]

Interestingly, Slattery cites the decision in *St. Catherine's Milling and Lumber Co. v. The Queen*²⁸ as the example to demonstrate his point. In that case, the Privy Council held

²⁵"A Question of Trust", *supra* note 21 at 270.

²⁶"A Question of Trust," *supra* note 21 at 274.

²⁷*Ibid.*

²⁸(1888), 14 A.C. 46 (P.C.) [hereinafter *St. Catherine's Milling*].

that where the Province of Ontario, as the owner of the land within its boundaries at Confederation, received the benefit of the surrender of Indian lands to the federal government, it also assumed the corresponding obligations. Of course, the Privy Council did not come to its decision on the basis of the fiduciary concept; as we have seen that characterization of the relationship between the Crown and Aboriginal peoples did not occur until almost exactly 100 years later. Subsequent cases dealing with the Robinson-Huron Treaty and Treaty 3 described Ontario's obligations as moral, not legal. And in the prairie provinces, the problem that *St. Catherine's Milling* created in respect of the original provinces at Confederation was avoided by the federal government's retaining ownership of the land until 1930. Furthermore, the various *Natural Resources Transfer Agreements*²⁹ entered into in that year between the federal government and the provinces of Manitoba, Saskatchewan and Alberta dealt with this "s.109 problem" by ensuring *constitutionally* that the provinces were obliged to provide the federal government with any land necessary for the federal government to fulfill its obligations to Aboriginal peoples in addition to providing to the provinces a limited jurisdiction in relation to the regulation of hunting, fishing and trapping by Indians.

So, whether or not the matter may be resolved in the same fashion in other parts of Canada, it appears that on the prairies the NRTA provides a constitutional answer to the issue of obligation, and one that comports well with the idea that fiduciary obligations arise out of relationships. This approach provides an alternative interpretive possibility to that put

²⁹*Constitution Act, 1930*, 20 & 21 Geo. V, c. 26 (U.K.) [hereinafter NRTA].

forward by Slattery, Rotman and others, the crux of which centres on the fact that a fiduciary **relationship** must exist in order to give rise to fiduciary **obligations** and, in the case of Aboriginal peoples, that fiduciary relationship is embedded in s. 91(24).

This is the position adopted by Richard Boivin in his article, “À qui appartient l’obligation de fiduciare à l’égard des autochtones?” who said:

L’obligation de fiduciare après 1867 a donc été acheminée exclusivement à la Couronne fédérale par l’intermédiaire d’article 91(24) de la *Loi constitutionnelle de 1867*. La relation privilégiée et le rôle protecteur avec les autochtones qui émanent de cette compétence appartiennent uniquement à la Couronne fédérale. Les Couronnes provinciales en sont exclues. Le devoir de fiduciare s’exerce en contrepartie d’un pouvoir qui échappe aux provinces et dont l’assise constitutionnelle est prévue dans l’article 91(24) de la *Loi constitutionnelle de 1867*. Cette interprétation est conforme à l’essence du partage des compétences.³⁰

By 1984, when *Guerin* was decided by the Supreme Court of Canada, Aboriginal rights (including treaty rights) had been constitutionally recognized and affirmed and the litany of injustices perpetrated against Aboriginal peoples since European contact was

³⁰(1994) 35 *Les Cahiers de Droit* 3-21 at 13. A rough translation is as follows:

The fiduciary obligation after 1867 has thus been conveyed exclusively to the federal Crown by means of s. 91(24) of the Constitution Act, 1867. The privileged relationship and the role of protector of Aboriginal peoples that emanates from this power belongs only to the federal Crown. The provincial Crowns are excluded from it. Fiduciary obligations are exchanged for a power that is outside the competency of the provinces, the legal foundation for which is contained in s. 91(24). This interpretation conforms to the essence of the constitutional division of powers.

becoming known even in the dominant culture.³¹ Although constitutional protection for Aboriginal rights resulted from explicit constitutional amendment, the constitution's reference to "existing" rights signalled a change in course for the future rather than a complete break with the past. It has been in this sense necessary for the courts to look to the past while moving forward with the "unfolding political narrative" of Aboriginal rights.³²

Thus, the words of judgments in cases already decided are assembled to forge the link between the present and both the past and the future. Some may argue that those past words will not support the new uses to which they are being put. Others will respond that such connections are only historical facts, that the words of the past don't determine their uses in

³¹It is interesting to me to observe on a purely personal level how true it is that history is written by the victors. I consider myself to be a reasonably well-educated person. I have an extensive university education and I have always read voraciously. The community within which I live and work is also well-educated and well-read. However, I recall as a teenager learning of the Winnipeg General Strike not in school (although I attended school in the North end of Winnipeg until grade ten) but in my own reading. I completed high school and university in Regina, but learned very little about the Regina Riot (perhaps more pointedly, I learned to call the event the "Regina Riot", not the "On to Ottawa Trek") or the Estevan Coal Miners Strike, other than that there was one. Similarly, I learned nothing of Aboriginal issues as a law student in the early 1970s (perhaps I simply chose the wrong classes) nor did I learn that the Royal Proclamation dealt with Indians as well as Quebec until I became involved in the Charlottetown constitutional negotiations in 1992.

³² The "invention" of the fiduciary relationship appears to be the equitable instrument by which the law can be made to secure some rough justice. The court's pronouncement on its existence accords well with Ronald Dworkin's description of what courts do:

Legal claims are interpretive judgments and therefor combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.

From *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986) at 225.

the future. In either case, the process of adjudication in which the courts engage is essentially an interpretive one in which legal actors acknowledge the inherent "slipperiness" of words as "signifiers"³³ rather than brute facts that control interpretive possibilities.

Law as interpretation is more than mere semantics; it is the entangling of value and content.³⁴ In this entangling process history is significant, and the account of the Supreme Court's decision to describe the relationship between the Crown and Aboriginal peoples as a fiduciary one must address that history.

The story of the development of the fiduciary relationship begins with the extraction of a confirmation of rights in the Royal Proclamation of 1763. On the prairies, it continues with the imposition on Parliament of a constitutional obligation to protect Indians and their lands contained in s. 91(24) of the *Constitution Act, 1867*, the assumption by Canada of the equitable obligations of the Imperial Crown to Aboriginal peoples with the transfer of Rupert's Land and the North-Western Territory in 1870, the conclusion of treaties with First Nations in Western Canada in the 1870s, the creation of the prairie provinces and the constitutional handing over of lands and resources to the provinces via the NRTA. It

³³(With apologies to Ferdinand Saussure, Jacques Lacan and Jacques Derrida.) I have a "B.C." cartoon that I think sums it up: In the first panel, the two women are sitting on a rock but they're facing in opposite directions. In the second panel, one of them has a line across the back of her hand, which she is holding up and looking at. "I've gotta scratch," she says. "So, go ahead," says the other. In the last panel, the first woman faces the reader and says, "Language is a stupid form of communication".

³⁴Ronald Dworkin, *Law's Empire*, at 48.

culminates with the entrenchment in the Constitution of a recognition and affirmation of "existing aboriginal and treaty rights" in s. 35 of the *Constitution Act, 1982*.

This thesis therefore explores the fiduciary concept and, in particular, its judicial development in the case of the Crown and Aboriginal peoples in order to attempt to answer the question already posed of whether or not there is a fiduciary relationship between the provincial Crown and Indians in Saskatchewan and to identify the fiduciary obligations that might arise out of such a relationship if it exists. To this end, Chapter 2 examines the fiduciary context, generally and its application in the context of Aboriginal peoples. Chapter 3 briefly examines the historical/legal context of First Nations on the prairies and their relationship with the Crown in its various manifestations. Chapter 4 re-examines the section 109 cases in which provinces were held to receive the benefit of the removal of Aboriginal title to lands. Chapter 5 reviews the application of provincial laws to Indians to ascertain the extent of provincial power over them. Finally, Chapter 6 concludes that in the absence of provincial power, there is no fiduciary relationship between provinces and Aboriginal peoples and, therefore, there can be no fiduciary obligations.

CHAPTER 2

THE FIDUCIARY CONCEPT AND ABORIGINAL PEOPLES

The Fiduciary Concept

Fiduciary obligations arise in equity in the same manner as does the trust. They are a constraint on the ability of persons who have legal power to affect the beneficial interests of others in the exercise of that legal power. That is, where fiduciary obligations exist, strictly legal power cannot be exercised at the whim of its holder, without regard for the interests of the beneficiaries who will be affected by the exercise of that power.

Equity's control over the common law functions in a manner similar to that by which constitutional conventions constrain the exercise of legal power under the Constitution.³⁵ However, the significant difference between equity and constitutional conventions is that, as a result of the merger of the common law and chancery courts by virtue of the *Judicature Acts* of the late 19th century, modern courts of law are obliged to **enforce** equitable rules as well as strictly legal rules.³⁶ Equity acts as the law's conscience and it is for that reason that

³⁵The **law**, for example, permits a Governor General to choose any one to serve as Prime Minister of the country. Constitutional **convention** requires that the leader of the political party with the largest number of seats in the House of Commons is chosen. In fact, our written constitution doesn't mention the Prime Minister at all. Legal power is actually vested in the Governor General.

³⁶The terms "equitable" and "legal" are used here in their technical senses. The popular use of the term "equitable" as the equivalent of "fair" or "just" (usually as a

equitable rules are privileged at law, with the result that, in common parlance, “equity trumps law”.³⁷ The whole concept of the fiduciary relationship and the fiduciary obligations that it gives rise to results from the desire of equity to produce justice.

Nevertheless, the fiduciary concept has attracted a certain modishness in recent years that mitigates against its careful understanding. As Madame Justice Southin, of the British Columbia Court of Appeal observed:

The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "*fiducia*" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract without full disclosure, by sending a client a bill claiming disbursements made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words.³⁸

This concept of trust underlies the fiduciary concept and the stringent standards of conduct to which fiduciaries are held. A duty of loyalty therefore arises out of the state of reliance that results when persons, or their affairs, are in the hands of a fiduciary, for the reason that the fiduciary then has unilateral power over the other, "placing the latter at the

contradistinction to what is legal, which is an historically interesting usage) inaccurately suggests a status that is lesser than law.

³⁷See in particular subsection 52(2) and subsection 52(1) and sections 53 to 56 of *The Queen's Bench Act, 1998*, S.S. 1998 c. Q-1.01.

³⁸Quoted with approval by LaForest J. in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 123.

mercy of the former's discretion."³⁹

The relationship between the Crown and Aboriginal peoples is one in which the element of faith and trust is possibly at its highest. In almost all of the other established cases of fiduciary relationships, the beneficiary always has the potential ability to choose another fiduciary;⁴⁰ in the case of Aboriginal peoples, there is no other fiduciary that may be chosen. The Crown has taken a clear, long-standing and explicit control over Aboriginal peoples by interposing itself between them and the white man, leaving them vulnerable and dependent upon the Crown's actions.

The Fiduciary Relationship

In 1989, LaForest J. succinctly pointed out the problem of the fiduciary relationship when he wrote, in *LAC Minerals Ltd. v. International Corona Resources Ltd.*, "There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship."⁴¹ This observation has been echoed, in some form or another, by

³⁹*Ibid*, at para. 133.

⁴⁰For example, in the relationships of doctor/patient, director/corporation, partner/partner, lawyer (or other professional)/client, the beneficiary can, at any time select another to fulfill the fiduciary role. It is acknowledged that the issue of choice is complicated by the fact that a fiduciary may well control the beneficiary's awareness of sufficient facts to make a reasoned choice of a fiduciary, and the issue is more complicated still in the case of children who are the beneficiaries in a fiduciary relationship. However, where the fiduciary relationship is one of parent/child, the relationship eventually ends when the child becomes an adult.

⁴¹[1989] 2 S.C.R. 574 at para. 145.

virtually every judge called upon to adjudicate in relation to such issues and by every commentator writing on the subject.

It wasn't until 1994, in the case of *Hodgkinson v. Simms*,⁴² that Justice LaForest was able to articulate what he described as a "fiduciary principle" that, in his words, "can be defined and applied with some measure of precision"⁴³. He began his analysis with a quotation from the judgment of Mr. Justice Dickson, as he then was, in the *Guerin* case a decade earlier. In *Guerin* it was necessary for Dickson J. to consider whether the established list of relationships on which fiduciary obligations had been founded was an exhaustive or closed list or whether it was possible to link the established cases together in some manner so as to provide for the possibility of expansion of the fiduciary concept to be applicable in new situations. Justice Dickson opted for the latter approach and described the connecting thread among the cases in this way:

... where by statute, agreement, or perhaps by unilateral undertaking, ***one party has an obligation to act for the benefit of another***, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary ...

It is sometimes said that the nature of the fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. ***It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty.*** The categories of fiduciary, like those of negligence,

⁴²*Supra*, note 39.

⁴³*Ibid*, at para. 29.

should not be considered closed.⁴⁴

According to LaForest J, Justice Dickson's approach was "conceptual"; it formed only the basic idea of the fiduciary relationship. The analytical structure, or flesh on the bones, was provided later in the guidelines developed by Madam Justice Wilson in *Frame v. Smith*:

Yet there are common features discernable in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of

⁴⁴*Ibid.* Emphasis is Justice LaForest's as quoted in *Hodgkinson v. Simms*. It has generally been assumed, as emphasized in this passage, that fiduciary obligations arise out of fiduciary relationships, and not otherwise. Thus, the establishment of the relationship is usually a necessary first step. For example, Wilson J. in *LAC Minerals*, found that when confidential information was provided by one corporation to another, a temporary fiduciary relationship was established. As Binnie J. observed, writing for the Court in *Cadbury Schweppes Inc. v. F.B.I. Foods Ltd.*, [1999] 1 S.C.R. 142, at para. 31, "This approach was not accepted by the other members of the court." The majority decision was based on the existence of a constructive trust for the very reason that it was difficult for them to see how a fiduciary *relationship* could be understood to exist in an arm's length commercial context. See also *Terra Energy*, in which the Alberta Court of Appeal held very explicitly that fiduciary obligations arise out of fiduciary relationships and the Supreme Court refused an application for leave to appeal. This point is critical to the analysis presented in this thesis and is returned to later.

the fiduciary holding the discretion or power.⁴⁵

LaForest J. emphasizes that Justice Wilson's guidelines are "indicia" that assist in recognizing a fiduciary relationship, without actually defining it.⁴⁶ And, even though given in dissent, these guidelines have been adopted by the majority of the court in virtually every subsequent Supreme Court of Canada decision relating to this subject. As guidelines, however, their precise formulation and emphasis may vary.⁴⁷

LaForest J. concludes that, outside the established categories of fiduciaries (which include relationships such as those of director and corporation, solicitor and client, trustee and beneficiary, agent and principal, life tenant and remainderman, partner and partner -- "relationships that have as their essence discretion, influence over interests and an inherent

⁴⁵[1987] 2 S.C.R. 99, at 136.

⁴⁶This same view was expressed by Sopinka J. in *LAC Minerals*, *supra* note 42. See, in particular, paras. 33 and 34.

⁴⁷For example, Mr. Justice Sopinka, in *LAC Minerals*, *supra* note 42, adopted or endorsed Justice Wilson's guidelines but noted, as well, that it was possible for a fiduciary relationship to be found although not all of these characteristics were present. He took the position that the converse was also true: the presence of all three characteristics would not automatically lead to the conclusion that a fiduciary relationship existed. He made these remarks in a commercial context in which one party to a potential joint venture used confidential information received from another to make enormous profits. Sopinka J. stated that it would be extremely rare to find the existence of a fiduciary relationship in an arm's length commercial transaction. However, all members of the Court agreed that vulnerability is an essential criterion of a fiduciary relationship. Even so, LaForest J. has pointed out that while vulnerability is essential to the existence of a fiduciary relationship it is not a hallmark of one. Indeed, he describes it as a "golden thread" that links many related causes of action such as undue influence, unconscionability and negligent misrepresentation, as well as a breach of a fiduciary duty.

vulnerability"⁴⁸) it is necessary to demonstrate the existence of a "mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party".⁴⁹

Aboriginal Peoples

As mentioned earlier, the well-known case of *Guerin*⁵⁰ establishes the existence of a fiduciary relationship between the federal Crown and Indian people. The case involved a situation in which an Indian Band had surrendered a portion of its reserve to the Crown in order to lease it to a golf club. The terms of the lease that were finally obtained by the Crown on behalf of the Band were much less favourable than those that were approved by the Band for the purposes of the surrender. The trial judge found the Crown in breach of trust and awarded damages. The Federal Court of Appeal set the judgment aside.

The Supreme Court of Canada in allowing the appeal arrived at a unanimous result, but the judges took several different routes to arrive at the same conclusion.⁵¹ Mr. Justice Estey decided the issue on the basis of the law of agency.⁵² The remaining judges found that

⁴⁸*Hodgkinson v. Simms*, *supra* note 39 at para. 31.

⁴⁹*Ibid.*

⁵⁰*Supra*, note 4.

⁵¹All nine judges sat on the case, although Chief Justice Laskin did not participate in the judgment. Dickson J. wrote for himself and three others, Wilson J. wrote for herself and two others, and Estey J. wrote his own decision.

⁵²This approach has not been taken up in any subsequent case.

a fiduciary relationship existed but they described it in somewhat different ways. According to Mr. Justice Dickson:

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.⁵³

Thus, Dickson J's conclusion that a fiduciary relationship existed is predicated on both the existence of Aboriginal title and its inalienability except to the Crown.

Madam Justice Wilson also concluded that fiduciary obligations existed that were enforceable at law, but she expressed her similar view in somewhat different language:

While I am in agreement that s. 18 [of the *Indian Act*] does not per se create a fiduciary obligation in the Crown with respect to Indian reserves, I believe that it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians as discussed in *Calder v. A.G.B.C.* [citations omitted]⁵⁴

She continues:

I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the bands for which they are set apart, this is more than just an administrative direction to the Crown. I think it is the

⁵³*Guerin*, *supra* note 4 at 494.

⁵⁴*Ibid*, at 518.

acknowledgement of a historic reality, namely that Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it.⁵⁵ . . .

The discretion conferred on the Governor in Council [by s. 18 of the Indian Act] is not an unfettered one to decide the use to which reserve lands may be put. It is to decide whether any use to which they are proposed to be put is "for the use and benefit of the band". This discretionary power must be exercised on proper principles and not in an arbitrary fashion.⁵⁶

Mr. Justice Dickson also described the specific fiduciary obligation operative in the *Guerin* case as:

"an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians".⁵⁷

Thus the source of the fiduciary obligation in the Crown lies in the historical fact of Aboriginal title, recognized in the Royal Proclamation, together with the assumption by the Crown of "dominion" over the land that became Canada and the subsequent vesting by Parliament, by virtue of the surrender provisions of the *Indian Act*, of a discretion in the Governor General (the Crown's representative federally) to dispose of Indian lands in the best interests of the Indians affected. Because the Crown has thus taken control over Aboriginal lands and granted to itself this discretion, the Crown's obligation is transformed

⁵⁵*Ibid*, at 518.

⁵⁶*Ibid*, at 519.

⁵⁷*Ibid*, at 494.

into a fiduciary one. In coming to this conclusion, the Court adopted the statements made by Ernest J. Weinrib in his article, "The Fiduciary Obligation,"⁵⁸ to the effect that the "hallmark" of a fiduciary relationship is that one party is at the mercy of the other's discretion.⁵⁹ Weinrib also described the fiduciary obligations that arise out of fiduciary relationships as "the law's blunt tool for the control of this discretion."⁶⁰

The *Guerin* case establishes not just that a fiduciary relationship exists between the Crown and Indian peoples, it also establishes that the relationship is *sui generis*⁶¹ -- that is, it is unique; it is not the same as the other established categories of fiduciaries. As a result, it would not be surprising that the duties or obligations that arise out of the relationship might also be unique. Indeed, it seems inescapable that that should be so. However, the Court's emphasis on this point in subsequent cases appears to indicate an insistence that arguments about obligations that arise in other fiduciary relationships will not necessarily be convincing. From another perspective, this *sui generis* character may be no more than a restatement of another point the Court emphasizes in all fiduciary cases, and that is that the specific nature of fiduciary obligations is determined by the specific nature of the relationship out of which they arise.

⁵⁸(1975), 25 U.T.L.J. 1.

⁵⁹As quoted in *Guerin*, *supra* note 4 at 501.

⁶⁰*Ibid.*

⁶¹*Ibid*, per Dickson J. at 499.

The *Guerin* case has been most often cited for the proposition that the list of categories of fiduciary relationships that will be recognized at law is not a closed one. It was this critical finding that enabled the Court to declare that this previously unrecognized relationship between the Crown and Aboriginal peoples could now be described as fiduciary. As already noted, the Court went on to conclude, in this regard, that:

It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty.⁶² [emphasis added]

Specifically, the Court determined in *Guerin* that the Crown's obligations in respect of the surrender of land were fiduciary in nature because the Indian interest in land arises outside the actions of the legislative and executive branches of government. That is to say, the origin of Indian title is in the Indians' use and occupation of the land prior to contact and not in the *Indian Act*. Consequently, the discretion in the Act given to the Governor in Council to apparently do what he or she wishes with surrendered Indian lands is a legal power that is constrained by the fiduciary obligation to act in the Indians' best interests.

The point is illustrated by the particular facts of the *Guerin* case. The Musqueam Band had agreed to surrender certain lands to lease them for use as a golf course, on the understanding that the Band would get a certain amount of revenue from the lands by doing so. When the Crown was unable to secure the lease price it had originally told the Band

⁶²*Ibid*, at 501.

would be available, the Court held it was obliged to inform them and to seek their concurrence to this change. The Crown's failure to do so was a breach of its fiduciary obligation to the Band. The Court described the situation in this way:

The oral representations [as to the terms of the lease] form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. ***They inform and confine the field of discretion within which the Crown was free to act.*** After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be ***unconscionable*** to permit the Crown simply to ignore those terms. . . . ***Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of the utmost loyalty to his principal.***⁶³ [emphasis added]

As is always the case in such matters, there are those who promote a narrow reading of the *Guerin* case and those who promote a larger understanding. Brian Slattery, whose writings are often quoted with approval by the Court, has maintained that the relationship ought to be understood more broadly than just in relation to the Indians' interest in land. According to him:

The Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and ***in particular*** in the possession and use of their lands.⁶⁴ [emphasis added]

Slattery argues that the origin of the fiduciary duty lies in the Crown's offer of protection to Indians from European settlers, which itself arises from the Royal Proclamation

⁶³*Ibid*, at 504.

⁶⁴"Understanding Aboriginal Rights" (1987) 66 C.B.R. 727, at 753.

and the declaration by the Crown that the Indian interest in land was inalienable except through the Crown. In cases subsequent to *Guerin*, the Court has adopted this view. For example, in *Paul v. C.P.R.*,⁶⁵ the Indian interest in land was described as "personal and usufructuary" to the extent that it was inalienable, except to the Crown, and that inalienability was itself "a protective measure for the Indian population lest they be persuaded into improvident transactions"⁶⁶.

In *Roberts v. Canada*,⁶⁷ the Court confirmed that the obligation owed by the Crown to Indians in respect of their lands is **recognized** by the *Indian Act* surrender provisions, not **created** by them. The case involved a dispute between two different Bands over which of them was entitled to a certain reserve. The Court said that:

"The Crown must hold the land comprising Reserve No. 12 **for the use and benefit of the Band.**"⁶⁸ [emphasis added]

This same sentiment is expressed again by the Court in *Mitchell v. Peguis Band*⁶⁹, where Dickson J. wrote:

⁶⁵[1988] 2 S.C.R. 654.

⁶⁶*Ibid*, at para 34.

⁶⁷[1989] 1 S.C.R. 322.

⁶⁸*Ibid*, at para. 22.

⁶⁹[1990] 2 S.C.R. 85.

The Indians ceded traditional lands to the Crown on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved to their use . . . interposing the Crown between the Indians and the market forces which, if left unchecked, had the potential to erode Indian ownership of their reserve lands. . . .⁷⁰

The Crown has always acknowledged that it is honour bound to shield Indians from any efforts by non-natives to dispossess Indians.⁷¹

The fiduciary thread was picked up by the Court in the subsequent case of *R. v. Sparrow*.⁷² The Court held in *Sparrow* that the generally fiduciary relationship between the federal Crown and Indians affected the manner in which the Aboriginal and treaty rights that were recognized and affirmed by s. 35 of the *Constitution Act, 1982* would be understood.

Mr. Sparrow was a member of the Musqueam Indian Band and was charged with offences under the federal *Fisheries Act* relating to the use of drift nets while fishing. His defence was that he was exercising an "existing aboriginal right" to fish and that the net length restriction contained in the Band's food fishing licence infringed the protection provided to these rights by s. 35(1) of the *Constitution Act, 1982*. Therefore, he argued, the restrictions were invalid and he could not be convicted of an offence for breaching them.

The *Sparrow* case marks the first time that the Supreme Court was called upon to consider the scope and import of s. 35. It is jointly authored by then Chief Justice Dickson

⁷⁰*Ibid*, at para. 85.

⁷¹*Ibid*, at para. 87.

⁷²*Supra*, note 7.

and Mr. Justice La Forest. They begin their analysis by quoting with approval from Professor Noel Lyon, who wrote:

. . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. ***It renounces the old rules of the game under which the Crown established courts of law and denied the courts the authority to question sovereign claims made by the Crown.***⁷³ [emphasis added]

The two justices then outlined the following as a framework within which s. 35 ought to be interpreted:

1. s. 35 requires a purposive, generous liberal interpretation;⁷⁴
2. treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians;⁷⁵
3. the honour of the Crown is involved and therefore fairness to the Indians is a governing consideration;⁷⁶
4. the federal government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples and any contemporary understanding of

⁷³*Ibid*, at para. 54.

⁷⁴*Ibid*, at para. 56.

⁷⁵*Ibid*, at para. 60.

⁷⁶*Ibid*, at para. 58.

Aboriginal rights must be defined in light of this historic relationship.⁷⁷

The court went on to hold that s.35 is a solemn commitment to Aboriginal peoples and that:

. . . the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must however, now be read together with s. 35(1). In other words, ***federal power must be reconciled with federal duty*** and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. [emphasis added]⁷⁸

Thus, the court concluded that the way in which a legislative objective is obtained must both "uphold the honour of the Crown" and "be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples."⁷⁹

The *Sparrow* case, although it can be narrowly interpreted as authority only for the proposition that s. 35 constrains federal power under s. 91(24), comments on these judicial developments as emphasizing "the responsibility of the Government to protect the rights of

⁷⁷*Ibid*, at para. 59.

⁷⁸*Ibid*, at para. 62.

⁷⁹*Ibid*, at para. 64.

Indians arising from the special trust relationship created by history, treaties and legislation".⁸⁰ The Court cited *Guerin* as authority for this proposition and went on to hold that one of the fiduciary obligations that arises out of that special trust relationship is the necessity to reconcile federal power with federal duty. *Sparrow* therefore emphasizes the important pro-active obligation on the Crown; it is not just *acts* of the Crown that may violate its fiduciary duties, it is also *non-acts*.⁸¹

During this period of the Court's development of the fiduciary relationship between the Crown and Aboriginal peoples, there are also a number of important fiduciary cases that do not involve Aboriginal issues at all. These cases do, however, make an important contribution to a proper understanding of the nature of fiduciary obligations generally.

In *LAC Minerals* LaForest J., writing for the majority, said:

The obligation imposed may vary in its specific substance, ***depending on the relationship***, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty

⁸⁰*Ibid*, at para. 58.

⁸¹This is a point made by now Supreme Court Justice W.I.C. Binnie, in his article, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?", 15 *Queen's Law Journal* 217-253 at 220, where he said:

Equally serious for governments is at least the possibility that the fiduciary duty places on Parliament a *positive* duty to act under section 91(24) of the *Constitution Act, 1867* in relation to Indians and lands reserved for Indian. It will be argued on behalf of Aboriginal organizations that Parliament no longer has a mere legislative power. It may now have a power coupled with a duty. [emphasis in original]

and interest and a duty not to profit at the expense of the beneficiary. *The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present.*⁸² [emphasis added]

In *Norberg v. Wynrib*, McLachlin J. wrote:

Inherent in the judgments of this Court in *Guerin* and *Canson*, is the requirement that the fiduciary have [sic] assumed or undertaken to "look after" the interest of the beneficiary. As I put it in *Canson*, at p. 543, quoting from this Court's decision in *Canadian Aero Service Ltd. v. O'Malley*, *supra*, at p. 606, "[t]he freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken -- an obligation which 'betokens loyalty, good faith and avoidance of a conflict of duty and self-interest'".⁸³

Madame Justice McLachlin went on to describe the fiduciary concept as one that provides "a greater measure of justice for the exploited".⁸⁴

In *Hodgkinson v. Simms*, the Court referred back to *Guerin* to emphasize that it is "*the nature of the relationship*, not the category of actor, that *gives rise to fiduciary obligations*".⁸⁵ [emphasis added]

And in *K.M. v. H.M.*, LaForest J. emphasized the point as follows:

In *Lac Minerals* I stressed the point, which also emerges from *Frame v.*

⁸²*Supra*, note 42 at para. 149.

⁸³[1992] 2 S.C.R. 226, at 292.

⁸⁴*Ibid*, at 293.

⁸⁵*Supra*, note 39 at para. 29.

Smith, that the substance of the fiduciary obligation in any given case is not derived from some immutable list of duties attached to a category of relationships. In other words, the duty is not determined by analogy with the "established" heads of fiduciary duty. Rather, the nature of the obligation will vary depending on the factual context of the relationship in which it arises. Recently, I had occasion to return to this point in the context of a doctor-patient relationship in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138. I there stated, at p. 149:

In characterizing the physician-patient relationship as "fiduciary", I would not wish it to be thought that a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship. As I noted in *Canson Enterprises Ltd. v. Boughton and Co.*, [1991] 3 S.C.R. 534, not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation. A relationship may properly be described as "fiduciary" for some purposes, but not for others.⁸⁶

It is this point that underlies the principal issue explored by this thesis. If it is the nature of the relationship that gives rise to fiduciary obligations, then it is the relationship between the provincial Crown and Aboriginal peoples that must be examined to determine if it is a fiduciary one, and, if so, what obligations arise out of it.

⁸⁶[1992] 3 S.C.R. 6 at 65-66.

CHAPTER 3

THE HISTORICAL/LEGAL CONTEXT

Introduction

When, in 1982, Canada and the Provinces asked the Parliament of the United Kingdom to enact the *Canada Act*, patriating Canada's Constitution, Indian organizations from Alberta, New Brunswick and Nova Scotia, concerned about the implications of the Canada Bill on treaty and other rights, applied to the English courts for a declaration "that treaty [or other] obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom."⁸⁷ Their counsel argued that the Royal Proclamation of 1763 illustrated the concern of the Imperial Crown for the rights of Indian peoples and constituted an undertaking on the part of the Imperial Crown to preserve and protect their lands and their rights. None of this was changed, they said, with the *Constitution Act, 1867*.

The Court of Appeal disagreed. The judges acknowledged that the Imperial Crown had been in its origins single and indivisible – the basis on which the Indians argued that the obligations to them undertaken by the Crown remained with the Imperial Crown – but through constitutional usage and practice, the Court said, the Crown became separate and divisible. The original concept of the Crown had been developed in the context of a unitary

⁸⁷*R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta and Others*, [1982] 1 Q.B. 892, at 909 [hereinafter *Secretary of State*]. The larger purpose of the Indian litigants was, of course, to persuade Parliament at Westminster that it could not pass the Canada Bill affecting Indian rights without Indian consent.

state and was reinforced by the British notion of its empire. Although the colonies might have enjoyed a measure of self-regulation, local laws were subject to being displaced by the laws of the Parliament at Westminster.⁸⁸

It is difficult to pinpoint the time at which the concept of the Crown was altered. The majority of the Court was of the view that although the Crown remained single and indivisible at the time of Confederation⁸⁹ and at least as late as 1888 when the *St. Catherine's Milling* case was decided by the Privy Council,⁹⁰ either by the time of the Imperial Conference of 1926 the Crown was "separate and divisible for each self-governing dominion or province or territory,"⁹¹ or, if not by then, certainly no later than the Statute of Westminster in 1931.⁹² The result of this conceptual division of the Crown, according to Lord Denning, was:

that those obligations which were previously binding on the Crown simpliciter are now to be treated as divided. They are to be applied to the Dominion or Province or territory to which they relate: and confined to it.⁹³

⁸⁸Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63 (U.K.).

⁸⁹*Supra*, note 88. Lord Denning at 913, states that executive power in relation to Indians and their lands "was vested in the Governor-General of the Dominion, acting through his representative: and he in turn represented the Queen of England, that is, the Crown – which, as I have said, was in our constitutional law at that time regarded as one and indivisible".

⁹⁰*Ibid*, Lord Denning at 915 states, "That judgment was given at a time when, in constitutional law, the Crown was single and indivisible".

⁹¹*Ibid*, at 917.

⁹²*Ibid*, May L.J., at 933, states, "I have no doubt that any treaty or other obligations which the Crown had entered into with the Indian peoples of Canada in right of the United Kingdom had become the responsibility of the Government of Canada with the attainment of independence, at the latest with the Statute of Westminster 1931".

⁹³*Ibid*, at 917.

Clearly, the emergence of the concept of the divisible Crown was necessary to the development of the former colonies into self-governing and autonomous nations. If it were otherwise, the Imperial Crown would have continued to rule. Indeed, this was a significant facet of the argument presented to the Court of Appeal on the Indians' behalf: since section 7 of the Statute of Westminster, 1931 continued the requirement for any alteration to the Canadian Constitution to be made by the British Parliament, Canada was not fully autonomous from Great Britain, even in 1982 before the Canada Bill was passed, and the responsibilities of the Imperial Crown in respect of its obligations to the Indian peoples had not been devolved. Of course, this was the significant part of the Canada Bill that the Indian applicants were concerned about: a patriated amending formula that provided for the Canadian Constitution to be amended, if at all, in Canada. If the patriated amending formula came to be, it would result, even on the basis of the argument presented to the Court by the Indian applicants, in the complete devolution of the Imperial Crown's obligations to the Indians and otherwise to the Crown in Canada.

However, once the U.K. Court of Appeal found that the Crown was divisible, and after in *Guerin* it was decided that the relationship (on the facts of that case) between the federal Crown and Aboriginal peoples was a fiduciary one, it has been assumed that the fact that the Crown is divided resulted in the provincial Crown also assuming fiduciary obligations. This assumption ignores the history of the relationship between the Crown and Aboriginal peoples in Canada, out of which any fiduciary obligations must flow.

The Royal Proclamation

The critical origin of the legal relationship between the Crown and Aboriginal peoples is found in the Royal Proclamation of 1763, wrested by Chief Pontiac from George III. Ronald Wright describes it this way:

With the French crushed, native nations no longer held the balance of power in North America. From now on, the victorious English saw them not as buffer states but as obstacles to settlement. Even their importance in the fur trade was evaporating; skins were becoming scarcer and many white frontiersmen, having learned Indian skills, wanted the Indians gone so they could take their place.

Foreseeing this, resenting the hostile and disdainful attitude of Amherst, and inspired by the messianic visions of a Delaware prophet, the Ottawa chief Pontiac united the northern tribes and came close to driving Britain from the Great Lakes in 1763. Pontiac lost, but his war was not entirely in vain. In October, King George signed a Royal Proclamation setting a boundary line between white and native America along the Appalachian chain. This document remains the legal basis for Indian reserves, land claims, and aboriginal rights in the United States and Canada to this day. Like much protective legislation decreed in European capitals, the proclamation was not only flouted by unruly colonists but did much to sharpen their thirst for independence.⁹⁴

The Royal Proclamation provided that the "several Nations or Tribes of Indians with whom We are connected and who live under our protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds."⁹⁵ In that connection, surveys or grants of Indian lands were forbidden, except through the Crown.

The Royal Proclamation has long been described as the Aboriginal Magna Carta⁹⁶, because it confirms the rights of Aboriginal peoples, speaks of them as "nations", and forms the basis of the relationship between Aboriginal peoples and the Crown in Canada, as

⁹⁴*Stolen Continents: The New World Through Indian Eyes Since 1492*, (Toronto: Viking, 1991) at 110. See also 223, where this latter point is buttressed by a quotation from George Washington's confidence to a business associate, "I can never look upon that proclamation in any other light (but I say this between ourselves) than as a temporary expedient to quiet the minds of the Indians." [!]

⁹⁵ See Bernard W. Funston & Eugene Meehan, *Canadian Constitutional Documents Consolidated* (Toronto: Carswell, 1994) at 75 [hereinafter "Funston & Meehan"].

⁹⁶See for example *St. Catherine's Milling* (1888) 14 App. Cas. 46.

successor to the Imperial Crown. It is referred to in section 25 of the *Canadian Charter of Rights and Freedoms* as one of the categories of included Aboriginal rights that may not be diminished in interpreting the individual rights guaranteed by the Charter. It is the bridge between Aboriginal peoples pre-contact and the arrival of the British Crown on North American soil. But it is also the unilateral undertaking on the part of the Crown that underlies the fiduciary relationship.⁹⁷ Without it, the fiduciary characterization the Supreme Court of Canada adopted in *Guerin* is impossible.

The Transfer of Rupert's Land and the North-Western Territory

Hudson Bay Company [hereinafter “HBC”] lands are a notable exception to the explicit territorial operation of the Royal Proclamation.⁹⁸ In 1763, of course, the governance of HBC lands rested with the Company by virtue of its Letters Patent of May 2, 1670. The exception of HBC lands in the Royal Proclamation was a recognition of that historical fact. However, when provision was made for the transfer of Rupert's Land to the new Dominion of Canada in 1867,⁹⁹ Schedule A to the Imperial Order in Council promulgated for that purpose expressly stated:

⁹⁷Even though different judges have chosen different ways of explaining the fiduciary relationship involving Aboriginal peoples, for all of them it has its roots in aboriginal title. The Royal Proclamation recognized aboriginal title and by itself represents the Crown's decision to initiate the relationship through assuming power over aboriginal title.

⁹⁸The Royal Proclamation reserves “for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained.” See Funston & Meehan at 78.

⁹⁹See section 146 of the *Constitution Act, 1867*, which provided for the admission of other colonies to Confederation upon issuance of an Imperial Order in Council.

. . . claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and *settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with aborigines*.¹⁰⁰ [emphasis added]

Thus, the argument may be advanced that not only did the principles articulated in the Royal Proclamation apply, but that they had been elevated to constitutional status as early as 1870 by virtue of their embodiment in the *Rupert's Land and North-Western Territory Order*.¹⁰¹ This was the view of Mr. Justice Morrow as he expressed it in the case of *Re Paulette's Application*:

It would seem to me from the above that the assurances made by the Canadian Government to pay compensation and the recognition of Indian claims in respect thereof did, by virtue of s. 146 [of the *Constitution Act, 1867*] . . . , become part of the Canadian Constitution To the extent, therefore, that the above assurances [contained in the Imperial Order in Council effecting the transfer of Rupert's Land and the North-Western Territory] represent a recognition of Indian title or aboriginal rights, it may be that the Indians living within that part of Canada covered by the proposed caveat may have a constitutional guarantee that no other Canadian Indians have.¹⁰²

The Numbered Treaties on the Prairies

Historian Olive Dickason describes Canada's promise to Imperial authorities to

¹⁰⁰As quoted in *Northern Justice: The Memoirs of Mr. Justice William G. Morrow*, W.H. Morrow ed., (Jointly published by the Osgoode Society for Canadian Legal History and the Legal Archives Society of Alberta, 1995) at 175.

¹⁰¹The Order is listed in the Schedule to the *Canada Act, 1982* as one of the instruments comprising the "Constitution of Canada".

¹⁰²[1973] 6 W.W.R. 97 at 136. Mr. Justice Morrow held that the Registrar of Land Titles was under a duty to file a caveat protecting Aboriginal interests in Crown lands located in the Northwest Territories. His decision was overturned by the Supreme Court of Canada on the technical ground that a caveat could not be filed against unpatented Crown lands. This decision was critical since, once the lands were granted from the Crown to a third party, there was no Aboriginal "interest in land" that could be protected by a caveat under the land titles system. However, the Supreme Court made no comment at all about the Rupert's Land Order or any of the related issues. (See *R. v. Paulette*, [1977] 1 W.W.R. 321 (S.C.C.)).

honour the provisions of the Royal Proclamation as leading directly to the numbered treaties.¹⁰³ She goes on to summarize treaty-making from the point of view of both Canada and the First Nations at the time:

[T]reaties had become the federal government's tool for extinguishing Indian land rights; it regarded them as the final, once-and-for-all means of opening up Indian lands for settlement and development. This was missed by the Amerindians at first because, by their custom, agreements were not considered permanent, subject as they were to changing conditions that would necessitate renegotiation and renewal. The phrase "as long as the sun shines and the water flows" was introduced by the whites; once it became part of treaty language, however, Natives expected whites to live up to their word. In their view, treaties were a means by which they would be able to adapt to the demands of the contemporary world within the framework of their own traditions. In return they agreed to be loyal subjects of the Crown, respecting its laws and customs. In the context of Indian-white relations in Canada, a treaty has been defined as a compact or set of fundamental principles that formed the basis for all future negotiations between Indians and whites.¹⁰⁴

The numbered treaties on the prairies, including Saskatchewan, were negotiated with the Indians by the Government of Canada.¹⁰⁵ That is they were entered into post-Confederation, by the federal Crown, before the province of Saskatchewan was created. Their purpose was to expedite settlement and make the eventual creation of the province possible, and to avoid the costly Indian wars that were, at that time, occurring in the United States. It must be emphasized that these treaties were not entered into by the Imperial Crown to be passed on later to its constitutional heirs. They were entered into directly by the federal Crown in Canada, and in this factual context it is difficult to understand how it can be possible that any obligations would devolve to the provinces through the constitutional division of powers. In addition, these treaties were entered into after 1867. At that time the division of powers created by the *Constitution Act, 1867* had already been established, and

¹⁰³*Supra*, note 10 at 273.

¹⁰⁴*Ibid*, at 275.

¹⁰⁵See *Badger*, *supra* note 7 at para. 39.

Saskatchewan didn't exist. There was no relationship arising between Saskatchewan and the Aboriginal peoples through the treaty-making process.

Creation of the Prairie Provinces

In 1905 the provinces of Alberta and Saskatchewan were created out of a portion of the Northwest Territories. By this time, the problems resulting from the extinguishment of the burden of Aboriginal title were well-known as a result of the s. 109 cases involving Ontario and Quebec.¹⁰⁶ The federal government had lost the benefits of the removal of Aboriginal title and retained the burden of the treaty promises by which surrender of Aboriginal title was obtained. Thus, when Saskatchewan was created the lands and resources within its boundaries remained in the hands of the federal government.¹⁰⁷ Dickson J. commented on the significance of this fact in *Guerin*, when he pointed out that because in British Columbia title to all Indian reserves in the province had been transferred to the federal Crown in 1938, the problems that arose on surrender of reserve lands in Ontario and Quebec did not arise in B.C.¹⁰⁸ The same situation obtains in Manitoba, Saskatchewan and Alberta, as a result of the NRTA which ensured that Canada retained ownership and control of Indians reserves when lands and resources were transferred to those provinces in 1930.

The NRTA and Section 109

The principal purpose of the NRTA was to effect a transfer of lands and resources to the prairie provinces, so as to put the provinces in the same position as those who originally entered Confederation. The preamble to the agreement sets out Canada's desire

¹⁰⁶These cases, starting with *St. Catherine's Milling*, are described in more detail in Chapter 4.

¹⁰⁷Section 21 of the *Saskatchewan Act, 1905*, 4 & 5 Edward VII, c. 42.

¹⁰⁸*Supra*, note 4 at 498.

“that the Province should be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources as from its entry into Confederation in 1905.”¹⁰⁹ The province apparently took the position that Canada had no authority to keep the natural resources in the first place.¹¹⁰ However, the federal government ensured both that it would retain ownership and control of Indian reserves and that Canada’s treaty obligations to the Indians were passed on as obligations owed by the province back to the federal government, in the form of an obligation to provide land. The specific provisions of the NRTA in Saskatchewan are paragraphs 10 to 12:

10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provision hereof.

11. The provisions of paragraphs one to six inclusive and paragraph eight of the agreement made between the Government of the Dominion of Canada and the Government of the Province of Ontario on the 24th day of March, 1924, which said agreement was confirmed by statute of Canada, fourteen and fifteen George the Fifth chapter forty-eight, shall (except so far as they relate to the Bed of Navigable Waters Act) apply to the lands included in such Indian reserves as may hereafter be set aside under the last preceding clause as if the said agreement had been made between the parties hereto, and the provisions of the said paragraphs shall likewise apply to the lands included in the reserves heretofore selected and surveyed, except that neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province.

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall

¹⁰⁹Funston & Meehan, at 317.

¹¹⁰*Ibid.*

apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.¹¹¹

When the NRTA was ratified and confirmed by the Saskatchewan Legislature, the Canadian Parliament and the Parliament at Westminster, it was enacted to have effect “notwithstanding” anything in the *Constitution Act, 1867* or in any other constitutional enactment.¹¹² Thus, the NRTA has constitutional status. It should also be noted that while paragraph 12 provides jurisdiction to the province to enact hunting laws that will apply to Indians, paragraph 11 makes it clear that the results of the s. 109 cases will not apply on the prairies.

The Divisible Crown Revisited

This brief recitation of the significant legal historical events in the development of Saskatchewan reveals that in fact there is no actual relationship between the provincial Crown and Aboriginal peoples in this province. So, while there is no doubt that the Crown is divisible, it hardly seems to matter. This is not to deny that the decision of the English Court of Appeal in *Secretary of State* refers to provinces in the constitutional division of powers sense. That is, jurisdiction is devolved through the constitution to the authorities created by the constitution. However, in Canada, jurisdiction over Indians and their lands was provided constitutionally to the federal government, not to the provinces. Provincial jurisdiction under the constitution is not altered by the notion that the Crown can be divided. But, in the absence of a relationship in fact, can there still be a relationship in law?

¹¹¹*Ibid*, at 320.

¹¹²Section 1 of the *Constitution Act, 1930*, 20 & 21 Geo. V, c. 26 (U.K.), *ibid*, at 298.

CHAPTER 4

THE PRE-*GUERIN* CASES

Introduction

Those who argue that fiduciary obligations follow the division of powers under s. 91 and s. 92 of the *Constitution Act, 1867* look for a connection between *Guerin*, which was decided in 1984, and cases involving Aboriginal interests that were decided over the previous century. They see a foreshadowing of *Guerin* in the equitable concerns expressed by the judges over the perceived unfairness of the provinces receiving the benefit of the removal of the “burden” of Aboriginal title, without being subjected to the corresponding liabilities of so doing. While it is true that the language of fairness operates to stir equity’s conscience, it is only in the most vague and ambiguous of senses that a link can be found between these old cases and the explicitly equitable foundation to the Supreme Court’s decision in *Guerin*. Nevertheless, these decisions merit close analysis from that perspective.

Section 109 - Who “owns” the land; who pays?

Prior to the Supreme Court’s decision in *Guerin*, in which the relationship between the federal Crown and Aboriginal peoples was first described as fiduciary, a number of cases had dealt with issues involving questions of Aboriginal title to land, the Royal Proclamation and treaties with the Indians. However, while Indian interests were being determined by these cases, Indian interests were not represented. The parties to this litigation were federal

and provincial governments, or interests derived from them. Their concern was the effect of various provisions of the *Constitution Act, 1867* on Indian lands surrendered to the Crown via treaties. The primary provision is s.109, which provides that:

all lands, mines, minerals or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

Thus, the effect of s.109 was to give to the confederating provinces the entire beneficial interest in all Crown lands within the boundaries of each of them at the time of Confederation. The first question that arose in relation to the effect of Indian land surrenders under treaties was the impact of s.109 on Indian lands that were surrendered under treaties with the federal government entered into after Confederation. Were Indian lands that had not been surrendered “Lands reserved for the Indians” within the meaning of s. 91(24), and therefore federal lands? Or were they, too, vested in the provincial Crown by virtue of s. 109?

The first such case was *St. Catherine's Milling*¹¹³. It is usually cited for the proposition that the Indian title to land is a “personal and usufructary right” that is a “mere burden” on the Crown’s underlying title. The case involved the question of whether or not the federal or provincial Crown had the right to dispose of the timber on the land that was surrendered by the Indians under Treaty No. 3, which was concluded with the federal Crown

¹¹³*Supra*, note 97.

in 1873. Once the treaty was concluded, the federal government granted a timber permit to St. Catherine's Milling and Lumber Co. The Province of Ontario challenged the right of the federal government to do so, arguing that the underlying title in the lands was at all times vested in the "Crown" and, once the Indian title was surrendered, the beneficial interest in the lands passed to the province because of s. 109 of the *Constitution Act, 1867*.¹¹⁴

Ultimately, the Privy Council agreed with Ontario. According to Lord Watson:

[T]here has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.¹¹⁵

The Privy Council held that, although a surrender could only be given to the federal Crown (because only the federal Crown had jurisdiction to do so under s. 91(24) of the *Constitution Act, 1867*¹¹⁶), once the surrender occurred, s. 109 resulted in the province

¹¹⁴The federal government's position was that lands reserved to the Indians by virtue of the Royal Proclamation were federal lands over which Parliament had not only jurisdiction, but also ownership or beneficial entitlement. In this respect, the Royal Proclamation applied geographically to all lands within the Crown's dominion and outside the boundaries of the governments the Crown erected in Quebec, East Florida, West Florida and Grenada after the Treaty of Paris.

¹¹⁵*Supra*, note 97 at 55. This use of the term "Crown" is in a type of generic sense. It refers to the political notion of parliamentary government and is nicely explained by Lord Denning in *Secretary of State*. In 1888, when *St Catherine's Milling* was decided, the prevailing concept of the Crown was as one and indivisible. Subsequent maturation of the "Dominions", and in particular in federal states such as Canada, have resulted in the notion of the divisible Crown. So, to say that lands are vested in the Crown simply posits a notion of the state; it doesn't deal with the issue of which Crown, federal or provincial.

¹¹⁶This point is confirmed in the more recent case of *Delgamu'ukw v. British Columbia*, [1997] 3 S.C.R. 1010. The case arose in British Columbia, where few treaties

obtaining the benefit of it. The Privy Council rejected the federal argument that because s. 91(24) gave jurisdiction to Parliament over Indians and lands reserved for them, including lands reserved (in a different sense) by virtue of the Royal Proclamation, it also provided the federal Crown the beneficial ownership of that land when the burden of the Indian title was removed through entering into a treaty. According to the Privy Council, the provisions of the *Constitution Act, 1867* that purport only to allocate jurisdiction (ie. sections 91, 92, etc.) could not be understood to deprive the provinces of the rights to land that were specifically provided to them under s. 109.

Lord Watson also said that, since the benefit of the surrender accrued to Ontario, Ontario ought to fulfill the obligations under the treaty for payments of money that the federal government had undertaken in the name of the Crown. It is this reference that has been seized upon now to “suggest” the “existence of concurrent federal and provincial fiduciary obligations to aboriginal peoples”.¹¹⁷ It is these comments that have been described as hinting at the trust or fiduciary relationship with the province.

However, *St. Catherine's Milling* does not speak at all to the fiduciary issue. Its answer to the question of which manifestation of the Crown is entitled to the benefit of the

with the Indians have been concluded. The Province argued that it had extinguished the Indian title to the land prior to the enactment of s. 35 of the *Constitution Act, 1982*, which recognizes and affirms “existing aboriginal and treaty rights”. The Supreme Court said that the province does not have the constitutional competence to extinguish Aboriginal title.

¹¹⁷Rotman, *supra* note 21 at 226.

produce of the land within the boundaries of a province was that it falls to be determined by the terms of Confederation itself. Section 91(24) gave the federal Crown legislative power over Indians, but s. 109 gave the land to the provinces. Removal of the “burden” of Indian title could only be accomplished by the federal Crown, but once removed the province benefits – because of the constitution. The obligations that the Privy Council decided belonged to the province were not thereby transformed into obligations to Aboriginal peoples; nor were they fiduciary in nature. At best, they were obligations owed by the province to the federal government and seem to result from some notion of fairness, which the Privy Council did not explain. But the consequences of treaty surrenders were explored further in the subsequent cases of *Ontario Mining Company and Attorney General for Canada v. Seybold and Attorney General for Ontario*¹¹⁸ and *Re Treaty No. 3 Annuities*.¹¹⁹

In *Seybold*, questions similar to those in *St. Catherine’s Milling* arose when a portion of a reserve set aside under Treaty No. 3 was itself surrendered. On October 8, 1886, the Rat Portage band surrendered a portion of its reserve, known as Reserve 38B, to the Crown in trust to sell it and to invest the proceeds of the sale on behalf of the band. Both the federal and provincial governments originally claimed to be entitled to dispose of the land surrendered from the Reserve, but the parties to the litigation were those claiming to have obtained title to the land from the federal and provincial Crowns, respectively, and not the Crowns themselves. In fact, the two Crowns had entered into an agreement, which was

¹¹⁸[1903] A.C. 73 [hereinafter *Seybold*].

¹¹⁹[1910] A.C. 637 (P.C.).

incorporated into two identical statutes enacted by both Parliament and the Ontario Legislature, by which the federal government acknowledged that it had, after concluding Treaty No. 3, purported to set aside Indian reserves in an area that later it was discovered lay within the boundaries of Ontario and by which Ontario agreed to concur in these land selections in order to avoid disruption. The agreement also provided for the establishment of a joint commission to settle and determine any questions that might arise between the two governments in relation to the reserves thus created.¹²⁰ The Privy Council thus took the position that, because of its view of the rights of the two governments, it did not need to discuss the effect of the 1886 surrender, although, in that respect it agreed with the decisions below, which held that while jurisdiction over Indian reserves rested with Parliament by virtue of s. 91 of the *Constitution Act, 1867*, the territorial and proprietary rights to the land once surrendered out of the Indian reserve passed to the province under s. 109.

Nevertheless, the Privy Council commented that the 1873 surrender, by which the treaty was achieved, required the province to adhere to the conditions under which the treaty was obtained, if it was to receive the benefits of the treaty. As Lord Davey, put it:

Let it be assumed that the Government of the province, taking advantage of the surrender of 1873, came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could only

¹²⁰See, Statutes of Canada, 54 & 55 Vict. c. 5 and Statutes of Ontario, 54 Vict. c. 3 (1894).

be effectively made by the joint action of the two governments.¹²¹

The phrase “at least . . . an honourable engagement,” while it implies something other than a legal obligation, foreshadows the equitable arguments arising 80 years later. But this honourable engagement does not arise out of the province’s relationship with the Indians, nor is it an obligation owed to the Indians; it is an obligation owed to the federal Crown.¹²²

Treaty No. 3 Annuities dealt with the issue of who had to pay the annuities provided for under Treaty No. 3. The Privy Council held here that there was no legal obligation on the province to make the payments under the treaty because the province did not enter into the agreement with the Indians. As Lord Loreburn remarked:

It may be that, as a matter of fair play between the two Governments, as to which their Lordships are not called upon to express and do not express an opinion, the province ought to be liable for some part of this outlay. But in point of law, which alone is here in question, the judgment of the Supreme

¹²¹*Seybold, supra* note 118 at 82-83.

¹²²See Rotman, *supra* note 21 at 233 - 235. Rotman criticizes the notion of “honourable engagement” because it results in the Indian signatories to a treaty being unable to enforce their right to have reserves set aside for them. It should be noted that this case was not about the enforcement of Indian rights under the treaty. It was about who gets to sell the land surrendered by them. In the Divisional Court, Street J. said, at 81, that “the surrender [under the treaty] was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians [that is, the creation of Indian reserves in the sense we understand that term today]. The Provincial Government could not without plain disregard of justice take advantage of that surrender and refuse to perform the condition attached to it”. No doubt, then, if the issue before the court had been the failure of Ontario to consent to the establishment of any reserves, the court would have viewed that as a failure of an essential condition of the treaty bargain, and Ontario would not have received the benefit of the land because the land would have remained subject to the Indian interest.

Court appears unexceptionable.¹²³

The *Robinson Treaties Annuities*¹²⁴ case was an appeal from an arbitration award on the question of whether the federal or the provincial government was responsible for paying the increase in the annuity payments under the Robinson-Huron and the Robinson-Superior treaties of 1850. These treaties had been entered into between the Indians and the old Province of Canada, prior to Confederation. One of the annuities provided for in the treaties was a payment tied to increased revenues from the surrendered lands. The arbitrators held that, because the lands surrendered were all located in Ontario, Ontario was responsible for the payments since it had received the benefit of the treaties. However, the Supreme Court of Canada, affirmed by the Privy Council, decided the case on the basis of sections 111 and 112 of the *Constitution Act, 1867*, which capped the amount of debt from the old Province of Canada that Ottawa would be obliged to accept. So, if the increased annuities were a “debt” within the meaning of those provisions, they had to be assumed by the province to the extent that they exceeded the limit contained in s.112.

These cases consistently illustrate the Privy Council’s view that while only the federal government has the power to make treaties, it cannot thereby bind the provinces to accept the terms it has negotiated in their absence. None of the cases remark upon the existence of any kind of obligation by the provinces to Aboriginal peoples in such situations, although

¹²³Rotman, *supra* note 21 at 237.

¹²⁴[1897] A.C. 199 (P.C.).

they do remark on the apparent injustice of the provinces receiving the best of both worlds, as it were.¹²⁵ Furthermore, these cases were all decided long before the Supreme Court of Canada determined that a fiduciary relationship existed between the Crown and Aboriginal peoples, out of which relationship there arose obligations on the Crown that placed limits on the Crown's ability to exercise its legal powers without regard to the interests of the Aboriginal peoples for whose benefit it acted.

Leonard Rotman describes these cases as being about provincial responsibility for treaty obligations, and argues that "because Indian treaties are concrete manifestations of the Crown's fiduciary obligations to aboriginal peoples, these cases demonstrate one basis for the existence of provincial fiduciary duties to Native peoples."¹²⁶ However, even Rotman notes that the "judges found it difficult to find that the provinces could be held liable for obligations undertaken by the federal Crown".¹²⁷ This is, of course, the point. This quartet of s. 109 cases has clearly established that treaties with the Indians must be entered into with the federal Crown in order to validly extinguish the Aboriginal title, but that once the Aboriginal title is surrendered to the federal Crown, the provincial Crown receives the benefit of the surrender. The obligations assumed by the federal Crown in exchange for the surrender of Aboriginal title is binding on the federal Crown, although the provincial Crown may be under some form of moral obligation that would require it to repay the federal

¹²⁵Rotman, *supra* note 21 at 240.

¹²⁶Rotman, *supra* note 21 at 237.

¹²⁷*Ibid.*

Crown.¹²⁸ However, if the amount involved exceeds the limitation on debts assumed by the provinces at Confederation by virtue of sections 111 and 112 of the *Constitution Act, 1867*, the federal Crown would not, in any event, be able to require the province to pay. Most importantly, any requirement, moral or legal, for the province to pay for the benefit of the surrender it receives is an obligation that it owes not to the Aboriginal peoples who signed the treaty, but to the federal Crown.

The Subsequent Cases

Rotman argues that subsequent cases to these four contain inferences of provincial fiduciary obligations to Aboriginal peoples. He cites *Smith v. R*¹²⁹, *Gardner v. The Queen in Right of Ontario*,¹³⁰ *Cree Regional Authority v. Robinson*¹³¹ and *Delgamu'ukw v. British Columbia* at the trial level.¹³² However, the issue of provincial fiduciary obligations was not analyzed in any of them.

In fact, *Smith* confirms the position articulated in *St. Catherine's Milling and Seybold*

¹²⁸At best, a province's failure to provide land to enable the federal Crown to live up to its treaty obligations may result in the failure of a condition precedent that would then negate the surrender and leave the province unable to deal with the land thus burdened by the Aboriginal title.

¹²⁹[1983] 1 S.C.R. 554.

¹³⁰ [1984] 45 O.R. 760, online: QL (O.J.)

¹³¹[1991] 4 C.N.L.R. 84 (F.C.T.D.)

¹³²[1991] 3 W.W.R. 97

that the proprietary interest in lands from which the Indian title is removed vests in the Crown in right of the province, and specifically declines to deal with issues beyond that one. Rotman describes the Court as “hint[ing] that a provincial Crown may be found liable for discharging the obligations stemming from an Indian land treaty or from the effects of a surrender of Indian reserve lands to the Crown.”¹³³ The case is another example of the s. 109 problem in Ontario and Quebec, but this time the lands in question were located in New Brunswick. The Court held, again, that because of s. 109 the province “owned” the land in question subject to the burden of Aboriginal title. Once that burden was removed by a surrender to the federal Crown – because only the federal Crown has such authority by virtue of s. 91(24) – the land fell under the ownership and control of the province. The hints to which Rotman points are contained in the quotations taken from *Seybold*, but the Court makes no further comment in this regard.

Gardner dealt with a preliminary issue of whether or not the Eagle Lake band was able to maintain concurrent actions in both the Ontario and Federal Courts seeking a declaration that it had a right of possession of headlands in the parts of its reserve that were bordered by bodies of water. This was another case involving Treaty No. 3, and Ontario had entered into an agreement with Canada, implemented through complementary legislation, by which it had acknowledged this right. It later reneged on that agreement by passing unilateral legislation. In this context, the Ontario High Court of Justice was called upon to decide whether or not a cause of action existed and could be maintained in that court and in

¹³³Rotman, *supra* note 21 at 240.

the Federal Court. White J. refused to grant the motion to strike that was requested by Ontario. In a decision that is remarkable in its foreshadowing of the Supreme Court's declaration of the existence of a fiduciary relationship only six months later in *Guerin*, he concluded:

It is my view that the cases leave it open for the Crown to stand in the position of trustee with regard to an asset such as the Band's reserve. Furthermore, as I read the cases, there is no absolute requirement for the capacity of the Crown to act as trustee to exist, that some statute or agreement explicitly accepts on the part of the Crown that it is a trustee. In other words, the relationship of trustee as between the Crown and the Band could arise by implication from statute or circumstances.¹³⁴

Nevertheless, White J. was not called upon to make a determination about the relationship between the provincial Crown and Aboriginal peoples, nor did he. In addition, the nature of the issue was complicated by the fact that the province had entered into an agreement with Ottawa that both had implemented through legislation. Under these circumstances, perhaps, indeed, a trust-like relationship might have been created.

The evidence to support a provincial fiduciary relationship in *Cree Regional Authority* and in *Delgamu'ukw* is also subtle. In the former case, the Cree Regional Authority applied for injunctive relief to compel the Federal Administrator to comply with the federal environmental and social impact assessment and review procedures contemplated by sections 22 and 23 of the "James Bay and Northern Quebec Agreement" and the *James*

¹³⁴*Supra*, note 130 at 9 (Q.L.).

Bay and Northern Quebec Native Claims Settlement Act. The court held that federal and provincial law each required an assessment procedure. The injunction obtained compelled the administrator to comply with the federal government's duty under the Agreement.

Rouleau J. observed:

Crown counsel [for the province] also submitted that, if the JBNQ Agreement leads to confusion or is open to two possible interpretations, it should be construed in such a manner as to ensure that one area of jurisdiction will not intrude upon the other. In light of the fiduciary obligation imposed upon the federal government in its dealing with the native population, I perceive no ambiguity; the Agreement mandates the protection of the aboriginal people who relinquished substantial rights in return for the protection of both levels of government.

Crown counsel also pointed out to me that *Sparrow, supra*, does not distinguish between the federal and provincial Crown; that the provincial authorities are also responsible for protecting the rights of the native population. I agree. I am not suggesting that the province of Quebec will not be vigilant vis-à-vis the Cree or Inuit populations. However, the issue with which I am charged is to determine the responsibility of the federal government and whether or not it should live up to its responsibility. ...

16 years ago all parties obviously realized that there were areas exclusive to the federal domain which could be affected by any future development; that further development of Northern Quebec would certainly implicate the Inuit and Cree communities. As a result, the 1975 Agreement fully recognized that at some future date two jurisdictions would be involved, as well as the aboriginal people; all parties were cognizant of the necessity of reducing to writing a procedure for future cooperation. I find it incomprehensible that on the one hand the intervenors, the Attorney General for Quebec and Hydro-Québec declare themselves bound to abide by the JBNQ Agreement, but on the other hand other signatories to the same agreement are excluded.¹³⁵

In other words, the existence of the special relationship between the federal Crown

¹³⁵*Supra*, at note 131.

and Aboriginal peoples supports fiduciary obligations to protect their interests even when those interests are taken into account by the provincial Crown. In fact, this passage suggests that the Provincial Crown has no fiduciary obligations.

In the trial decision in *Delgamu'ukw*, McEachern C.J.B.C. found that the province had a fiduciary obligation based on the special facts of that case:

Keeping in mind the general obligation of the Crown towards Indians, and that "the categories of fiduciary, like those of negligence should not be considered closed," (*Guerin*, p. 384), it is my view that a unilateral extinguishment of a legal right, accompanied by a promise, can hardly be less effective than a surrender as a basis for a fiduciary obligation.¹³⁶

He specifically rejected the idea that *Sparrow* could be understood as establishing a "general comprehensive fiduciary duty in every situation".¹³⁷ But he went on to conclude that in the case before him:

where a general obligation has been recognized, a promise made and acted upon for well over 100 years is sufficient to support an enforceable, fiduciary or trust-like obligation upon the Crown.¹³⁸

What is important about his statement about the fiduciary obligation of the provincial Crown is that it is based on a specific, long-standing relationship.

¹³⁶*Supra*, note 132 at 416.

¹³⁷*Supra*, note 132 at 417.

¹³⁸*Ibid.*

The Supreme Court's decision in *Bear Island* was a brief one. The question for the court was whether or not the Temagami Indians had sufficient title in certain lands covered by Treaty 3 to support the filing of a caution or caveat under the provincial land titles legislation. The Court concluded that whatever Aboriginal title had existed, it was extinguished by the treaty and therefore the cautions could not be filed. According to the Court:

It is unnecessary, however, to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve. It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians. These matters currently form the subject of negotiations between the parties. It does not alter the fact, however, that the aboriginal right has been extinguished.

The Court's reference to ongoing negotiations has been taken to imply that the provincial Crown has fiduciary duties to Aboriginal peoples because it was the province that was in negotiation with the Temagami people at the time.¹³⁹ This is rather slim support for such a conclusion, particularly given the existence of the 1894 agreement between Canada and Ontario that brought Ontario into all subsequent treaty negotiations.¹⁴⁰ It may also be noteworthy that, in a subsequent case involving a motion to quash the cautions appeals filed

¹³⁹Rotman, *supra* note 21 at 242.

¹⁴⁰See Alan Pratt, "The Problem of Extinguishment in the Numbered Treaties", A Discussion Paper for the Royal Commission on Aboriginal Peoples, May 10, 1995 (revised September 1996) at 12.

by the Temagami Indians under the *Land Titles Act*, the Indians argued that the Crown had breached its fiduciary duty to them by breaching the treaty. In this regard, the motions judge stated:

Moreover, the lands subject to the cautions are held by the Crown in Right of the Province of Ontario, but it is the federal government that is signatory to the treaty.¹⁴¹

It should be noted that all of these cases have arisen in parts of Canada to which s. 109 of the *Constitution Act, 1867* applies, not the NRTA. As we have seen, the provisions of the NRTA were specifically designed to avoid the problems that Canada had experienced as a result of s. 109 in the rest of Canada. Paragraph 11 specifically provides for the application of the agreement between Ontario and Canada dated March 24, 1924, by which the long struggle between them starting with *St. Catherine's Milling* was finally resolved, with the result that Indian reserves remain vested in Canada's name and may be dealt with by Canada if surrendered. As well, paragraph 10 specifically obliges the provinces to supply land to Canada to enable it to fulfill its treaty promises. Saskatchewan's continuing obligation to do so was recently confirmed by Gerein J. in *Lac La Ronge Indian Band v. Canada*¹⁴² who held:

Accordingly, unless lawfully amended, s. 10 remains in full force without any limitations. The authority of Canada to request land is unchanged as is Saskatchewan's obligation to provide land. The Province remains bound by

¹⁴¹*Bear Island Foundation v. Ontario*, [1995] O.J. No. 3431, at para. 34.

¹⁴²[2000] 1 C.N.L.R. 245.

the section and must abide by its requirements.¹⁴³

There is very little in any of these cases to suggest that the provincial Crown has fiduciary obligations to Aboriginal peoples falling outside the existence of any fiduciary relationship. Of course, the most significant area in which the actions of provincial Crowns have been examined by the courts in the post-*Guerin* cases involves situations invoking the protection of s. 35 of the *Constitution Act, 1982* for infringement of Aboriginal and treaty rights.

Professor Slattery appears to locate the fiduciary relationship in the Constitution, since he describes the Crown's fiduciary obligations as having been "constitutionalized by section 35".¹⁴⁴ He also observes that "so long as the Provinces have powers and rights enabling them to affect adversely Aboriginal interests protected by the [fiduciary] relationship, they hold attendant fiduciary obligations".¹⁴⁵ I have already argued that fiduciary obligations arise only out of fiduciary relationships. But if that relationship is embodied in the Constitution through the protection afforded to Aboriginal and treaty rights by s. 35, then it would also follow that it is only when provinces are able to affect such rights adversely that they have a fiduciary relationship and hence fiduciary obligations. This raises the question of the extent to which provinces may enact laws that have such effects and

¹⁴³*Ibid*, at para. 361.

¹⁴⁴"A Question of Trust," *supra* note 21 at 263.

¹⁴⁵*Ibid*, at 274.

requires a consideration of the manner in which provincial laws of general application apply to Aboriginal peoples *ex proprio vigore*.

CHAPTER 5

THE APPLICATION OF PROVINCIAL LAWS TO INDIANS

Introduction

The power to enact laws in relation to Indians and their lands rests with Parliament by virtue of s. 91(24) of the *Constitution Act, 1867*. However, the courts have long held that Indian reserves are not federal enclaves and that provincial laws of general application also apply to Indians and to their lands,¹⁴⁶ because Indians are people in the province. So, while provinces cannot enact laws that are directed at, that single out, or that are otherwise “in relation to” Indians or their lands, they *can* enact laws that will apply to Indians along with everyone else. Even so, the application of such laws to Indians or their lands is limited by the doctrine of interjurisdictional immunity. The classic statement of the doctrine is set out by Beetz, J. in *Bell Canada v. Québec*:

¹⁴⁶In *R. v. Jim* (1915), 4 C.N.L.C. 328, the British Columbia Supreme Court held that the provincial *Game Protection Act* did not apply to an Indian who killed a deer for food on the reserve on which he lived, on the basis that the “management” of Indian reserves was governed by the *Indian Act* and beyond provincial jurisdiction. It is noteworthy that this case was decided before the enactment of the NRTA, a point which was of significance in *Cardinal v. A-G Alberta* (1973), 7 C.N.L.C. 307, which is cited as authority for the proposition that Indian reserves are not “federal enclaves”. In *Cardinal* the accused was an Indian who was charged with an offence against provincial wildlife legislation for selling moose meat to a non-Indian on the reserve where the accused lived. A majority of the Supreme Court of Canada specifically rejected the argument made by the accused that Indian reserves were enclaves to which provincial laws did not apply, pointing out that the double aspect doctrine was well-established and valid provincial legislation could always incidentally affect a subject matter assigned to federal jurisdiction.

Works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, . . . provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction.¹⁴⁷

While it is difficult to set out the precise boundary between this doctrine and the pith and substance doctrine, by which validity of a law must first be established, generally, those provincial laws that affect a vital part of a matter of federal jurisdiction will be “read down” in order to operate within the limits of their scope of validity. However, the important result of the doctrine of interjurisdictional immunity is that, where it applies, “it renders provincial regulation inapplicable even in the absence of federal legislation governing the matter at issue”.¹⁴⁸ In other words, a provincial law that is not overridden by a federal law as a result of actual operational conflict can still be rendered inapplicable to a matter falling within federal jurisdiction, whether or not there is a federal law with which it does or might conflict.

Of course, the difficult question to answer is when, in the words of Beetz, J, does a law bear on a subject in such a manner as to affect it in that character that makes it a matter of federal jurisdiction. According to Professor Hogg:

This formulation seems to involve a judicial judgment as to the severity of the impact of a provincial law on the federal subject to which the law ostensibly

¹⁴⁷[1988] 1 S.C.R. 749 at para.20.

¹⁴⁸*SIGA v. CAW – Canada*, [2000] 8 W.W.R. 338 (Sask. Q.B.)

extends. If the provincial law would affect the "basic, minimum and unassailable" core of the federal subject, then the interjurisdictional immunity doctrine stipulates that the law must be restricted in its application (read down) to exclude the federal subject. If, on the other hand, the provincial law does not intrude heavily on the federal subject, then the pith and substance doctrine stipulates that the provincial law may validly apply to the federal subject.¹⁴⁹

The matter is further complicated by the fact that even provincial laws that would otherwise be read down on the basis of the doctrine of interjurisdictional immunity apply to Indians by virtue of s. 88 of the *Indian Act*. That is, Parliament has exercised its jurisdiction under s. 91(24) to extend the application of such provincial laws to Indians, as long as the provincial laws do not infringe on treaties or federal statutes and as long as they are provincial laws of general application. This reference to provincial laws of general application is not to be confused with such laws that already apply to Indians *ex proprio vigore*. Here the requirement that the provincial law be one of general application is found in s. 88, and is intended to restrict federal incorporation by reference under that section to only those provincial laws that do not single out Indians. That is, s. 88 does not and cannot invigorate provincial laws that deliberately and obviously go beyond provincial jurisdiction; to do so would no doubt amount to an invalid delegation of power from one constitutional authority to another. It is also important to recognize that, as a provision of the *Indian Act*, s. 88 only extends the application of provincial laws to Indians as defined by that Act. As a result, provincial laws thus made applicable to status Indians may not apply to non-status Indians and Métis.

¹⁴⁹Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997), looseleaf edition, at 15-33 [hereinafter Hogg].

However, since s. 91(24) is a head of power that is a group of people, any of the laws that Parliament could make in relation to those people will be listed in s. 92 as heads of provincial power, not in other categories of federal power under s. 91. That is, in making laws in relation to Indians and their lands, Parliament would not find independent jurisdiction under other heads of federal power enumerated in s. 91. Thus, except for the fact that Parliament in legislating in relation to Indians and their lands is legislating under s. 91(24), such laws would otherwise, in pith and substance, be laws in relation to matters such as property and civil rights or matters of a local or private nature, and fall within provincial jurisdiction. The use of federal power under s. 91(24) to provide for the application of all relevant provincial laws to this group of people in each province is thus a convenient and expedient mechanism by which to establish a body of law applicable to them, and avoids the necessity of developing a complex regime of what would otherwise be provincial law at the federal level, subject to the limitation of the treaties and other federal legislation.

As an illustration of this point, it is interesting to compare the decision of the Supreme Court in *Four B Manufacturing Ltd. v. United Garment Workers of America*,¹⁵⁰ and the decision of the Saskatchewan Court of Appeal in *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan et al.*¹⁵¹ Both cases dealt with the question of whether it was provincial or federal labour laws that applied to activities on reserve. In *Four B*, Beetz, J., in the Supreme Court, pointed out that the *Indian Act* did not regulate

¹⁵⁰[1980] 1 S.C.R. 1031.

¹⁵¹(1982), 135 D.L.R. (3d) 128.

labour relations on reserve, nor did the Canada Labour Code. As a result, he said, “these labour relations accordingly remain subject to laws of general application in force in the Province *as is contemplated by s. 88 of the Indian Act*”. In other words, provincial labour laws applied because they were laws of general application invigorated by section 88.

In *Whitebear*, however, provincial labour laws did not apply. Relying on the interpretation given to the Supreme Court's decision by the Federal Court of Appeal in *Francis v. Canada Labour Relations Board*,¹⁵² the Court of Appeal found that where the Band Council carried out programs expressly within the authority conferred upon it by the *Indian Act*, the activity was a "federal work, undertaking or business" within the meaning of the Canada Labour Code, and that employees involved in it were "very directly involved in activities closely related to Indian status" as this phrase was used by Beetz J. in *Four B Manufacturing*.¹⁵³

Thus, the apparent narrowness of the scope of s. 91(24) is misleading. While virtually all provincial laws apply to Indians in the province, it is as a result of the exercise of both provincial and federal power in this complex fashion, and it is important to determine whether a provincial law applies to Indians of its own force, or because it has been adopted by the exercise of federal jurisdiction. This distinction is important in the context of specific cases of infringement of Aboriginal rights by provincial laws. Notable first of all, is that

¹⁵² [1981] 1 F.C. 225.

¹⁵³ *Ibid*, at para. 46.

treaty rights, which are, together with Aboriginal rights, protected by s. 35 of the *Constitution Act, 1982*, cannot be infringed by a provincial law applicable to Indians by s. 88 of the *Indian Act*, because s. 88 contains this explicit limit on the provincial laws that it breathes life into. Furthermore, the extension of provincial laws via s. 88 does not include laws that are in relation to Indian lands.

Secondly, a provincial law that applies to Indians by virtue of s. 88 and infringes an Aboriginal right, would, in my view, fall to be justified by the federal government because it is federal jurisdiction that has been exercised in relation to Indians, even though in the form of a provincial law. The provincial law is made applicable by the exercise of federal power. This point was recognized by Madam Justice Smith in *SIGA*, where she said:

This section [s. 88] has been interpreted as a federal adoption, or incorporation by reference, of provincial laws of general application, ***making such laws applicable as a part of federal law***¹⁵⁴.

Later, she said, “It is clear that provincial laws ***cannot affect*** aboriginal or treaty rights.”[emphasis added] .¹⁵⁵ This is also the argument made by Richard Boivin, :

Ainsi, une loi provinciale d’application générale qui touche à la quiddité indienne serait incorporée par renvoi dans le droit fédéral, et c’est donc sous la coupe d’une loi fédérale que la provinciale incorporée en vertu de l’article 88 de la *Loi sur les Indiens* passerait le test de l’article 35 de la *Loi*

¹⁵⁴*Supra*, note 148 at para. 33.

¹⁵⁵*Ibid*, at para. 69.

constitutionnelle de 1982.¹⁵⁶

Clearly, the *Sparrow* justification of such provincial laws by the federal Crown will be difficult, if not impossible. Parliament will have had nothing to do with the development of the provincial law and will not be knowledgeable of the reasons for its enactment. But surely these practical problems do not transform the provincial Crown into a fiduciary. Rather than burden the provincial Crown with obligations that are not connected to any relationship that the provincial Crown has to Indians, it should more appropriately fall back to Parliament to justify its enactment of a law in relation to Indians that incorporates provincial law in so sweeping a manner as to permit such law to infringe Aboriginal or treaty rights. Indeed, *Sparrow* suggests that s. 88 is itself a breach of the federal Crown's fiduciary obligations and ought not to be permitted to extend the application of provincial laws to situations in which those laws might infringe Aboriginal or treaty rights.

In Saskatchewan, though, as in the other prairie provinces, provincial jurisdiction over Indians is also available under paragraph 12 of the NRTA. Under paragraph 12, the province is authorized to make laws respecting hunting, fishing and trapping that will also be applicable to Indians, again, with some notable limitations. First of all, the provincial legislation enacted under this authority must be for the purposes of conservation. Secondly,

¹⁵⁶*Supra*, note 30 at 20. Translation:

Thus, a provincial law of general application that touches on Indians *qua* Indians would be incorporated by reference into federal law and it would be under the scope of federal jurisdiction that a provincial law incorporated by virtue of s. 88 of the *Indian Act* would be able to pass the s. 35 test.

Indians cannot be prevented by provincial law from hunting for food at any time of year on unoccupied Crown lands and lands to which they have a right of access. The NRTA can therefore be seen as a special case or variation on the s. 88 situation, by which federal application of certain provincial laws in certain provinces occurs, this time supported by a constitutional amendment rather than just a federal statute.¹⁵⁷

As a result, Saskatchewan statutes may validly be applicable to Indians if they fall into one of three categories:

- They are provincial laws of general application and apply to Indians in the same way that they apply to everyone in the province. These laws are made pursuant to provincial jurisdiction.¹⁵⁸
- They are wildlife laws, enacted for the purposes of conservation, but they don't prevent Indians from hunting for food at any time on certain lands. These laws are made pursuant to specific provincial jurisdiction provided for

¹⁵⁷Martland J. seems to make this point in *Calder* when he describes the impact of the NRTA and refers to section 69 of the *Indian Act, 1927*, which provided to the Superintendent General the power to declare provincial gaming laws to apply within a province or territory and which ceased to have effect on the prairies when the several natural resources transfer agreements were entered into and confirmed by constitutional amendment. However, under the NRTA, the province is not limited in respect of laws that affect treaties – although s. 35 now provides for that limitation subject to justification – and presumably valid provincial laws would also be subject to federal paramountcy on the assumption that s. 91(24) provides the federal government with authority to enact such laws if it chose to.

¹⁵⁸As in *R v. Hill* (1907), 5 O.L.R. 406 (C.A.), in which an Indian was convicted of the unauthorized practice of medicine under a provincial statute, or *Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C.R. 1031, in which provincial labour laws applied to a shoe manufacturing business located on a reserve and owned by a corporation that was owned by Indians, and in which the workers were mainly Indians, or *R. v. Francis*, [1988] 1 S.C.R. 1025, in which provincial traffic laws were held to be applicable to Indians on reserve

in the NRTA and therefore in the Constitution.¹⁵⁹

- They are provincial laws of general application that *do* affect Indians as Indians, but they don't infringe on treaty rights or federal statutes and they are made applicable to them by virtue of federal law. These laws are made pursuant to federal jurisdiction.¹⁶⁰

However, it can only be those laws that can adversely affect Indians as Indians that attract a fiduciary component. That is, laws that apply to Indians because they apply to everyone else are obviously not burdened with fiduciary concerns, or at least not with the specific fiduciary concerns that relate to the Aboriginal peoples of Canada. They don't arise in the context of a fiduciary relationship as is clear from the fact that they are laws of general application. And, since provincial laws that affect Indians *qua* Indians are invalid, it seems that it is not possible for provincial laws, other than those enacted under the authority of the NRTA, to infringe Aboriginal or treaty rights nor, therefore, to be subjected to fiduciary criteria. That is, only where the province has power over Indians and their lands, can it have fiduciary obligations to them. However, this issue is confused by the apparent general application of s. 35 of the *Constitution Act, 1982* to both federal and provincial laws. The

¹⁵⁹The many cases relating to the NRTA determine that provincial gaming laws apply to Indians, both on and off reserve, within the limitations sets out in the NRTA relating to hunting for food on lands to which Indians have a right of access. While the cases grapple with the application of these general concepts to particular cases, the basic rule is that the province is competent to enact laws in relation to Indians in this limited area of jurisdiction.

¹⁶⁰As in *R. v. Dick*, [1985] 2 S.C.R. 309, in which provincial wildlife legislation, assuming it to be "in relation to" Indians, was incorporated by reference into the federal law by virtue of section 88. Compare this result to the one in *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, where provincial matrimonial property legislation was held not to apply to reserve lands because, since the provincial law was inconsistent with the provisions of the *Indian Act* relating to the management of reserves, it was caught by the exception in section 88.

implication that therefore arises is that provincial laws are caught by the *Sparrow* justification requirement. There seems to be no doubt that any infringing laws must be measured against the fiduciary criteria by which limitations on federal jurisdiction under s. 91(24) were imposed by virtue of *Sparrow*. It is not my argument that infringing provincial laws would not be subject to *Sparrow*; I argue the preliminary point that, generally speaking, provincial laws that infringe s. 35 are either invalid or inoperative.

The Application of s. 35 to Provincial Laws

Sparrow was the first case in which the Supreme Court considered s. 35 and it addressed a number of important issues for the first time.¹⁶¹ In the midst of that discussion, which on its facts was confined to the situation of an infringing federal law, the Court's decision contains one provocative line referring to provinces:

It [s. 35] also affords constitutional protection against provincial legislative power.¹⁶²

Dickson J., in his reasons for decision in the case of *Mitchell v. Peguis Indian Band*,¹⁶³ which was rendered by the Court only three weeks after *Sparrow*, made a similar generalized remark (and also in *obiter*) about s. 35 and provinces, stating “the newly entrenched s. 35

¹⁶¹Including such issues as what constitutes an “existing” right.

¹⁶²[1990] 1 S.C.4. 1075, at p. 1105. The published judgment is about 35 pages long.

¹⁶³[1990] 2 S.C.R. 85.

of the *Constitution Act, 1982*, applies to all levels of government in Canada”.¹⁶⁴ And in *R. v. Côté*, Cory J., speaking for the majority, said:

The text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict aboriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny.¹⁶⁵

It is to be noted that the statement about s. 35's application to provincial law in *Côté* is grounded on the Court's decision in *R. v. Badger*¹⁶⁶, and while more must be said about this case in due course, it is sufficient to observe at this juncture that *Badger* dealt with a provincial law enacted under the authority of the NRTA, which provides to the province a

¹⁶⁴*Ibid*, at pp.108-9. Justices Dickson and La Forest co-authored the *Sparrow* decision for the Court. *Mitchell* involved a statutory interpretation question concerning whether or not a reference to “Her Majesty” in section 90 of the *Indian Act* was a reference to both the federal and provincial Crowns. The question arose after Manitoba agreed to return an invalid tax collected by Manitoba Hydro to the Indian Band from which the tax had been collected. The Band's lawyers sued for their fees for representing the Band in the negotiations and obtained a pre-judgment garnishee to attach the tax rebate funds being held in trust for the Band by the government of Manitoba. The trial judge held that the funds due from Manitoba could not be garnished because of section 90 and the appeal by the plaintiff lawyers was dismissed. Although the court was unanimous in its conclusion to dismiss the appeal, the members of the Court came to this conclusion for very different reasons. Justice Dickson's decision was effectively in dissent. The majority view was that the references in section 90 to “Her Majesty” did not include the provincial Crown, but for other reasons the funds were not liable to garnishment. Even if the court had been unanimous on this point, it does not follow that provinces thereby gain fiduciary responsibilities. Justice Dickson's decision was not premised on a fiduciary argument. He only mentions the word “fiduciary” once, in relation to his description of *Guerin*. His judgment is based on a liberal approach to statutory interpretation that has its roots in the mischief rule developed more than 400 years ago in *Heydon's Case* (1584) 76 E.R. 637.

¹⁶⁵[1996] 1 S.C.R. 771 at para. 74.

¹⁶⁶[1996] 1 S.C.R. 771, [1996] 4 W.W.R. 457.

limited constitutional authority to make laws in relation to Indians.¹⁶⁷ *Badger* cannot be taken for a more generalized authority in relation to provincial laws. It should be noted also that the Court found in *Côté* that the provincial law in question did not *in fact* infringe any treaty or Aboriginal right.¹⁶⁸ Thus, the case did not involve a consideration of whether or not an infringing provincial law could be valid.

So while it is accurate to say that s. 35 does not distinguish between federal and provincial laws, this may well result from the fact that it is not necessary to frame the recognition and affirmation of Aboriginal and treaty rights in this way. Regardless of where the possibility of infringement may lie, Aboriginal and treaty rights are recognized and affirmed. And once protected in this manner, any laws that may infringe them must be subjected to the same level of constitutional scrutiny. The question that remains open is whether or not it is possible for provincial laws (apart from those authorized under the NRTA) to infringe on such rights.

Jurisdiction Concerning Indians and their Lands

The basic ground of jurisdiction in a federal state is the anchoring of laws in the heads of power assigned to the enacting authority by the constitution. In Canada, s. 91 and s. 92 provide the primary division of powers between the federal and provincial governments and

¹⁶⁷If the application of general provincial laws about hunting does not affect Indians *qua* Indians, then paragraph 12, and certainly its constitutionalization, was not required.

¹⁶⁸The law imposed a fee for bringing vehicles into a fishing area.

the fundamental tenets of federalism require that any law enacted by either must be characterized as being a law “in relation to” a matter that is set out in the relevant provision of the constitution. Various authorities have described this task of characterization in various ways. Hogg cites many of them:

- “a distillation of the constitutional values represented by the challenged legislation”
- “an abstract of the statute’s content”
- “the true meaning of the challenged law”
- “what in fact does the law do and why?”
- “the content or subject matter”
- “the leading feature”
- “the true character or substance”

But, as Professor Hogg then summarizes:

[U]sually they described it as “the pith and substance” of the law. The general idea of these and similar formulations is that it is necessary to identify the dominant or most important characteristic of the challenged law.¹⁶⁹

However, even when a law is characterized as being in relation to a matter that falls within federal or provincial jurisdiction, it is still possible that the other legislating authority may affect the matter incidentally, by legislating in relation to a matter that falls within its own competence. The idea that different laws may be enacted “in relation to” the same general subject matter because in one aspect they fall in the list of federal powers and in another aspect they fall in the list of provincial powers, is called the “double aspect” doctrine, and is firmly entrenched in Canadian constitutional jurisprudence.¹⁷⁰ Dickson referred to this

¹⁶⁹Hogg at 15-6 and 15-7.

¹⁷⁰First articulated by the Privy Council in the case of *Hodge v. The Queen* (1883), 9 App. Cases. 117.

phenomenon in the Aboriginal context:

One can over-emphasize the extent to which aboriginal peoples are affected only by the decisions and actions of the federal Crown. Part and parcel of the division of powers is the incidental effects doctrine according to which a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other; as recently stated in *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, *supra*, at p. 275, "Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects...." As long as Indians are not affected *qua* Indians, a provincial law may affect Indians, and significantly so in terms of everyday life. Section 88 of the *Indian Act* greatly increases the extent to which the provinces can affect Indians by acknowledging the validity of laws of general application, unless they are supplanted by treaties or federal law.¹⁷¹

The idea that a matter may have a double aspect seems like it ought to be precluded by the language of s. 91 and s. 92, which assign jurisdiction over the enumerated subjects "exclusively" to Parliament and the legislatures, respectively. Nevertheless, as Hogg explains:

The courts have not explained when it is appropriate to apply the double aspect doctrine, and when it is necessary to make a choice between the federal and provincial features of the challenged law. Lederman's explanation seems to be the only plausible one: the double aspect doctrine is applicable when "the contrast between the relative importance of the two features is not so sharp". In other words, the double aspect doctrine is the course of judicial restraint. When the court finds that the federal or provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either the Parliament or a Legislature.¹⁷²

¹⁷¹*Mitchell*, *supra* note 155 at 108-109.

¹⁷²15.5(c), p. 15-11. And, as Dickson J. commented in *General Motors of Canada Ltd. v. City National Leasing* (1989), 58 D.L.R. (4th) 255 at 274:

And, conversely, when the federal or provincial characteristics of a law are *not* equal, the law will be characterized as falling into one or the other category. In the context of provincial laws affecting Indians, then, the issue can be restated in this way: are the federal characteristics of a law that infringes an Aboriginal or treaty right so great that the law must fall into federal jurisdiction or can such a law be validly enacted by a province?

“Infringing” vs. “Affecting”

It is difficult to understand how a law that infringes an Aboriginal or treaty right could be characterized as anything other than a law “in relation to” Indians or their lands, thus falling within the jurisdiction of Parliament under s. 91(24). Indeed, Professor Hogg states that “provincial legislative power does not extend to laws that would impair aboriginal or treaty rights, because such laws affect ‘Indianness’”.¹⁷³

This point is emphasized by the Supreme Court’s definition of Aboriginal rights. In order to constitute an Aboriginal right, “an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right” and

In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate.

¹⁷³Hogg, at 27-42.

the activity must have developed prior to contact with Europeans.¹⁷⁴ A law that infringed such a right would clearly be in relation to Indians *qua* Indians and not just a law that incidentally affected them; any provincial aspect to the law that might exist would surely be outweighed by this federal dimension. This is clearly the conclusion that Smith, J. had in mind when she said in *SIGA*:

. . . it is clear from the decision of the Supreme Court of Canada in *Delgamuukw* that, if SIGA operates this casino as a matter of aboriginal right, then the test for "Indianness" is met and the matter would fall within federal jurisdiction (if, indeed, it is subject to non-aboriginal regulation at all).¹⁷⁵

Similarly, treaty rights are rights that are recognized – prior to Confederation by the Imperial Crown and subsequently by the federal Crown – in solemn documents entered into with the representatives of Indian nations. Again, the rights embedded in treaties are integral to their Indian character and therefore clearly fall within Parliament's jurisdiction. This point is bolstered by the fact that only the federal Crown had the capacity prior to 1982 and the enactment of s. 35 to extinguish Aboriginal or treaty rights, as has been recently confirmed by the Supreme Court's decision in *Delgamu'ukw*.¹⁷⁶ In that case, Chief Justice Lamer (as he then was) wrote:

It follows, at the very least, that this core [of "Indianness"] falls within the scope of federal jurisdiction over Indians. ***That core***, for reasons I will

¹⁷⁴*Van der Peet*, *supra* note 7.

¹⁷⁵*Supra*, note 147 at para. 57.

¹⁷⁶[1997] 3 S.C.R. 1010.

develop, *encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1)*. Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians". Provincial governments are prevented from legislating in relation to both types of aboriginal rights.¹⁷⁷ [emphasis added]

Of course, infringement is not the same thing as extinguishment. The question that is left unanswered by *Delgamu'ukw* is whether or not an infringement of a constitutionally protected Aboriginal or treaty right also touches on the "core of Indianness," although Lamer, C.J., may have provided a hint about how that question should be answered later in his decision when he said:

[A]s I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on "Indianness" or the "core of Indianness" . . . The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (*Four B*) and the driving of motor vehicles (*Francis*). The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and because those activities were "at the centre of what they do and what they are" (at p. 320). But in *Van der Peet*, I described and defined the aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that **aboriginal**

¹⁷⁷*Ibid*, at para. 178.

*rights*¹⁷⁸ *are part of the core of Indianness at the heart of s. 91(24).*
[citations omitted; emphasis added]¹⁷⁹

If the courts are weighing the provincial and federal characteristics of the law as being roughly equivalent when they determine that a provincial law may be valid, even though it may in some sense or aspect be viewed as falling within federal jurisdiction, then the use of the term “infringe” rather than “affect” gains some significance. Surely a law that infringes constitutionally protected rights goes beyond the “merely incidental” implication that flows from the word “affecting” so as to tip the balance in favour of characterizing the law as being within federal jurisdiction. However, one of the problems with the jurisprudence in this area as it has been developing is that it does not frequently approach the problem from this perspective.

British Columbia Court of Appeal Cases

The approach taken by the British Columbia Court of Appeal in *Kitkatla Band v. British Columbia (Small Business, Tourism and Culture)*¹⁸⁰ illustrates a more appropriate methodology. In that case, the Minister, acting pursuant to the province’s *Heritage Conservation Act*, which authorized the issuance of permits to “damage, alter or remove” aboriginal artifacts or heritage objects, wished to provide a permit to International Forest

¹⁷⁸This case only involved a question of Aboriginal rights, not treaty rights, but there is no reason to believe that the Court would treat treaty rights differently.

¹⁷⁹*Supra*, note 173 at para. 181.

¹⁸⁰ [2000] 2 C.N.L.R. 36.

Products Limited (Interfor) to cut certain culturally modified trees (CMTs).¹⁸¹ The Act also contained a provision that stated that the Act did not “abrogate or derogate from the aboriginal or treaty rights of a first nation or of any aboriginal peoples”. The Kitkatla Band argued that certain aspects of the legislation were invalid as provincial legislation because they constituted legislation in relation to Indians or their lands. The Band also applied for an order to prohibit the Minister from issuing a site alteration permit that would allow Interfor to cut down CMTs, on the basis that to do so would derogate from their Aboriginal rights.

The majority of the British Columbia Court of Appeal held that the British Columbia *Heritage Conservation Act* was valid provincial legislation of general application that applied to Aboriginal peoples *ex proprio vigore*¹⁸², or, alternatively, even if it was legislation “in relation to” Indians, it was invigorated by virtue of section 88 of the *Indian Act*. As Braidwood J.A., writing for the majority, stated:

¹⁸¹This phrase refers to “a tree that has been altered by native people as part of their traditional use of the forest”. They are common in British Columbia and are registered in a register of archaeological sites maintained by provincial government authorities. The Kitkatla Band argued that these trees have cultural and spiritual significance to them.

¹⁸²The majority referred to the Act’s stated purpose which was to protect all heritage property, whether or not it is of Aboriginal origin, while conceding that the vast majority of property that would be caught by these general provision would, in fact, be Aboriginal – especially since the Act referred to the time of European contact in the province (pre-1846) as being the defining time at which property would become heritage property. The majority also was of the view that the fact that the Act specifically provided that it was not intended to derogate from Aboriginal rights reinforces the conclusion that the Act, or portions of it, is not “in relation to” Indians, either in purpose or effect.

A provincial law which regulates all heritage objects and sites¹⁸³ in the Province cannot be said to impair the status or capacity of aboriginal peoples nor can it be said to regulate them *qua* Indians. The HCA [*Heritage Conservation Act*] is unlike the *Wildlife Act* provisions prohibiting the hunting of food, which Lambert J.A., in *Dick* found to give shape and meaning to the lives of the Alkali Lake Band and which is at the centre of what they do and who they are. Sections 12(2), 13(2)(c) and (d) of the HCA, by contrast, simply regulate the protection of heritage objects and sites, and that right to regulate includes the right to impose limits on that protection.

Accordingly, I am of the opinion that the impugned provisions of the HCA do not affect "Indians in their Indianness", "Indians in relation to the core values of their society", "Indians *qua* Indians" or the "status and capacity of Indians." Therefore, the provisions are valid *ex proprio vigore* and the appellants' argument must fail.¹⁸⁴

But, in any event, he said, since the Act was a law of general application within the meaning of section 88 of the *Indian Act* it was extended in its application by virtue of that section even if it would otherwise be caught by the doctrine of interjurisdictional immunity. Prowse J.A., in dissent, held that the legislation went beyond provincial jurisdiction and was not extended via section 88 because:

In my view, just as s. 88 cannot be applied to extinguish aboriginal rights, it cannot be applied to effectively destroy or interfere with aboriginal culture or heritage by authorizing the destruction of aboriginal heritage objects.

In coming to this conclusion, I do not wish to be understood as saying that every CMT [culturally modified tree], Indian arrowhead or other heritage object pre-dating 1846 [the date of European contact in British Columbia as established in *Delgamu'ukw*] must be preserved in order to enable aboriginal

¹⁸³But it is worth noting that he misstates the test set out in *Dick* of what is a law of general application. Casting a law in general terms does not necessarily end the inquiry. The purpose and effect of the law must also be considered.

¹⁸⁴*Supra*, note 176 at paras. 72 and 73.

peoples to maintain and pass on their heritage and culture to future generations. Rather, I am saying that ***legislation authorizing the destruction or interference with aboriginal heritage objects is fundamentally a matter for Parliament to deal with pursuant to its powers under s. 91(24)***, or for the governments and First Nations people to work out by agreement. [emphasis added]¹⁸⁵

The important point about this case is that the court focussed its preliminary inquiry on the issue of whether or not the provincial law in question was valid. This is the more precisely accurate inquiry that is required as an initial first step in assessing the relationship between provincial laws and Aboriginal or treaty rights. More frequently the courts explore the question of whether the law in question infringes upon an existing Aboriginal or treaty right without speaking first to the issue of the law's validity. It may be, however, that the courts are in fact determining this more fundamental first question by answering the second. In *Kitkatla* the majority's view was that the provincial law was valid, but it was also of the view that there was no infringement of an Aboriginal or treaty right.¹⁸⁶

Another recent British Columbia Court of Appeal case illustrates how the issues are transformed when characterized differently. In *Halfway River v. British Columbia*¹⁸⁷ the right to hunt asserted by the Band was based on Treaty 8. No provincial laws were challenged as unconstitutional; the Band was challenging the administrative actions of

¹⁸⁵*Supra*, note 172 at paras. 150 and 151.

¹⁸⁶Leave to appeal to the Supreme Court of Canada was granted in this case on August 17, 2000. A hearing date is not yet scheduled.

¹⁸⁷[1999] 9 W.W.R. 645.

provincial officials in the granting of cutting permits. But the province asserted that *it* had a right under the Treaty “to require or to take up land as the basis for its legislative scheme in respect of forestry”.¹⁸⁸ The three judges on appeal issued three separate reasons for their decision; one of them in dissent. The majority dismissed the appeal (which had the effect of granting the application sought by the Band) on the ground that the Crown had not properly consulted, as required by *Sparrow*, in order to justify an infringement of an Aboriginal or treaty right. However, the two judges in the majority disagreed about what the specific requirements of *Sparrow* were. Southin J.A., in dissent, would have allowed the appeal because she was of the view that the scope of the treaty right to hunt could not be determined in a judicial review application about the validity of a cutting permit. Instead, she said, it should be determined in an action:

The question in such an action would be whether what the Crown has done throughout the Halfway River First Nation's traditional lands by taking up land for oil and gas production, forestry, and other activities has so affected the population of game animals as to make the right of hunting illusory. "To make the right of hunting illusory" may be the wrong test. Perhaps the right test is "to impair substantially the right of hunting" or some other formulation of words.¹⁸⁹

Finch, J.A. observed that the fact that the right to hunt in this case was a treaty right did not result in the *Sparrow* test being inapplicable. As he put it:

In my view the fact that the Crown asserts its rights under Treaty 8 can place it in no better position vis-a-vis a competing or conflicting aboriginal treaty

¹⁸⁸*Ibid*, at para. 126.

¹⁸⁹*Ibid*, at para. 225.

right than the position the Crown enjoys in exercising the powers granted in either s. 91 or 92 of the *Constitution Act, 1867*.¹⁹⁰

If he is saying that the Crown cannot improve its position by not enacting laws, or that the administration of otherwise valid provincial laws is also limited by the constitutional division of powers, surely he is correct. But if he is suggesting that the source of provincial jurisdiction is in the treaty, surely he is wrong. The distinction is important. As he states later in his reasons:

I am therefore of the view that it is unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction on the Indians' right to hunt. In either case, however, the Crown's right qualifies the Indians' rights and cannot therefore be exercised without affecting those rights.¹⁹¹

This cannot be correct. The treaty does not confer jurisdiction; jurisdiction is derived from the Constitution. The province has the right to take up lands because, once it is surrendered and the burden of the Aboriginal title is removed, section 109 of the *Constitution Act, 1867* says that the control and benefit of the land passes to the province. However, the province is at all times limited by its own constitutional authority, and if it purports to legislate or act in relation to treaty rights, its actions are *ultra vires*. The province can only act if its actions merely “affect” treaty rights “incidentally.” It is only at this point that the question of *Sparrow* justification is raised, to justify provincial laws that merely affect Aboriginal or treaty rights.

¹⁹⁰*Ibid*, at para. 129.

¹⁹¹*Ibid*, at para. 136.

However, Finch, J.A. found that the treaty right to hunt of the Halfway River First Nation was infringed because the issuance of the cutting permit was recognized as affecting that right “in some way,”¹⁹² or, as he described it:

The granting of [the cutting permit] was the *de facto* assertion of the government's right to take up land, a right that by its very nature limited or interfered with the right to hunt.¹⁹³

Once an infringement is proven, the onus then shifts to the Crown to prove that it is minimal. And, while Finch, J.A. found that the impairment of the right in this case was indeed minimal, he still concluded that the permit had to be voided because of the failure of provincial officials to consult:

As laid down in the cases on justification, the Crown must satisfy all aspects of the test if it is to succeed. Thus, even though there was a sufficiently important legislative objective, the petitioners [sic?] rights were infringed as little as possible, and the effects of the infringement are outweighed by the benefits to be derived from the government's conduct, justification of the infringement has not been established because the Crown failed in its duty to consult. It would be inconsistent with the honour and integrity of the Crown to find justification where the Crown has not met that duty.¹⁹⁴

The honour and integrity of the Crown to which he refers is the honour and integrity of the federal Crown, which negotiated and signed Treaty 8. But he has placed the burden of the treaty obligation on the provincial Crown by characterizing the province's jurisdiction

¹⁹²*Ibid*, at para. 138.

¹⁹³*Ibid*.

¹⁹⁴*Ibid*, at para. 167.

over land and resources as a right that arises also out of the treaty, rather than as an exercise of jurisdiction under the Constitution. Seen in this latter light, the province's actions are limited in the usual way by its inability to legislate in relation to matters of federal jurisdiction falling under the authority of s. 91(24), and the question of justification in the *Sparrow* sense doesn't arise. That is, he could have simply held that the actions of the province were *ultra vires* because they entrenched on federal jurisdiction under s. 91(24).

Madame Justice Huddart did not agree with Justice Finch's *Sparrow* analysis, but saw the issue as one of shared use. That is, the province's ability to put in place a valid forestry program was limited by the treaty right to hunt. In other words, in order to be valid, the provincial scheme had to be compatible with the treaty right to hunt that is protected. She described it in this manner:

I do not think the District Manager for a moment thought he was "taking up" or "requiring" any part of the Halfway traditional hunting grounds so as to exclude Halfway's right to hunt or to extinguish the hunting right over a particular area, whatever the Crown may now assert in support of his decision to issue a cutting permit. At most the Crown can be seen as allowing the temporary use of some land for a specific purpose, compatible with the continued long-term use of the land for Halfway's traditional hunting activities. The Crown was asserting a shared use, not a taking up of land for an incompatible use. There was evidence before the District Manager to support a finding that the treaty right to hunt and Canfor's tree harvesting were compatible uses. That finding must underpin his conclusion that CP212 would not infringe the treaty right to hunt.¹⁹⁵

This is closer to the jurisdictional approach that seems most appropriate to the analysis of

¹⁹⁵*Ibid*, at para 173.

this issue. However, she went on to engage in a *Sparrow* analysis in addition:

Just as the impact of a statute or regulation may be scrutinized to ensure recognition and affirmation of treaty rights of aboriginal peoples, so may the impact of a decision made under such a statute or regulation by an employee of the Crown. The District Manager can no more follow a provision of a statute, regulation, or policy of the Ministry of Forestry in such a way as to offend the Constitution than he could to offend the *Criminal Code*.¹⁹⁶

And, while this is no doubt correct, it may be misplaced. That is, if a provincial official in following the requirements of a provincial statute infringes treaty rights, his or her actions are invalid, not subject to justification.¹⁹⁷

Huddart, J.A. went on to conclude that the failure of the provincial official to engage in an adequate and meaningful consultation with the Halfway River First Nation deprived them of an appropriate opportunity to establish the scope of their right to hunt. She stated:

[T]he District Manager was under a positive obligation to the Halfway River First Nation to recognize and affirm its treaty right to hunt in determining whether to grant Cutting Permit 212 to Canfor. This constitutional obligation required him to interpret the *Forest Act* and the *Forest Practices Code* so that he might apply government forest policy with respect for Halfway's

¹⁹⁶*Ibid*, at para. 177.

¹⁹⁷In a practical sense the difference may not be significant. That is, if the only way to ensure that provincial action does not infringe an Aboriginal or treaty right is to discuss with the holders of the rights their preferred means of exercising it and in recognizing the Aboriginal priority, the necessary provincial action that must be taken to ensure incidental effects only, and therefore validity, may be more or less the same actions that must be taken to demonstrate justification of a law that infringes. However, a provincial law that infringes on the core of Indianness in a manner that requires justification must be constitutionally invalid, and the important legal distinction is in the preservation of this integrity so as to confine provincial power within the parameters of s. 92.

rights. Moreover, the District Manager was also required to determine the nature and extent of the treaty right to hunt so as to honour the Crown's fiduciary obligation to the first nation: *Delgamuukw v. B.C.* [1997] 3 S.C.R. 1010 at 1112-1113 per Lamer C.J.C.; and see the discussion by Williams C.J.S.C. in *Cheslatta Carrier Nation v. B.C.* (1998), 53 B.C.L.R. 1 at 14-15.¹⁹⁸

This, too, is an odd way of conceptualizing the obligations of provincial officials. Recognition and affirmation of treaty rights is provided by the Constitution directly, not through “positive obligations” imposed on government officials. The result of such constitutional recognition is that treaty rights cannot be interfered with unless the interference results from a valid exercise of law-making authority that can be justified. In *Sparrow* there was no need to deliberate over the validity of the federal law in question, because it was unquestioningly valid in the absence of s. 35. However, validity isn’t enough and even valid laws must be justified, as *Sparrow* has made clear. In this case, however, the validity of the provincial action cannot be assumed. The actions taken by officials in issuing cutting permits are taken under provincial laws of general application. If these laws infringe treaty rights, they must clearly be read down under the doctrine of interjurisdictional immunity so that they do not have that result. Justification, including the issue of consultation, is a question that doesn’t arise.

¹⁹⁸*Ibid*, at para. 178. The references to *Delgamuuk’w* and *Cheslatta* are to those aspects of those judgments in which the consultation requirements of *Sparrow* were discussed. Lamer C.J., in particular, did not differentiate in his discussion of this issue between the federal and provincial Crowns. However, it is one thing to say that fiduciary obligations to consult will arise in the context of potentially infringing laws, whether they are federal or provincial, and it is quite another to say provincial laws that might affect Aboriginal peoples attract a duty to consult. This point is taken up later in this Chapter.

The Saskatchewan Cases

A number of the Saskatchewan cases that make reference to the fiduciary relationship between Aboriginal peoples and the Crown do so in the context of hunting offences and the NRTA.¹⁹⁹ Some discuss the issue in the context of claims against Canada or federal legislation.²⁰⁰ Only one case approaches the issue from a jurisdictional perspective, and this is *R. v. Keepness*.²⁰¹ Keepness was charged with trafficking in wildlife when he sold some deer meat to an undercover conservation officer on the reserve. The prosecution argued that the legislation in question applied to all people in the province, including Indians on Indian reserves, because of the jurisdiction provided to the province under the NRTA and because the law was justifiable under *Sparrow*. However, Keepness was acquitted because the judge held that the provincial law did not apply on reserve. His rationale for this conclusion was based on his view that the *Indian Act* and the *Constitution Act, 1930* (the NRTA) maintain federal jurisdiction on reserve and the sale or bartering of wild meat thus fell under federal jurisdiction.²⁰²

¹⁹⁹See, for example, *R. v. Janvier*, [1995] 4 C.N.L.R. 29 and *R. v. McIntyre*, [1990] S.J. No. 694.

²⁰⁰*R. v. Catarat*, [1999] 4 C.N.L.R. 139 (Q.B.), *R. v. Couillonneur*, [1997] 1 C.N.L.R. 130, and *R. v. Ironeagle*, [2000] 2 C.N.L.R. 163.

²⁰¹[2000] 2 C.N.L.R. 195.

²⁰²Smith Prov. Ct. J. specifically stated that he was not intending to attempt to revive the enclave theory and, indeed, the rejection of the enclave theory did not suggest that Parliament is unable to enact laws under s. 91(24) relating to Indian reserves, nor that the laws it might enact must be the same as provincial laws on the same subject matter. The enclave theory addressed the issue of provincial laws and their possible application to Indians and their lands and posited that provincial laws, whether or not of general application, could never apply to Indians and Indian lands.

While the Provincial Court Judge did not articulate his reasons explicitly in this manner, it appears that he concluded that the provincial law could not apply on reserve because it conflicted with the specific provisions of the *Indian Act* relating to the management of reserves.²⁰³ Thus, because the provincial law did not apply, the question of justification did not arise. Leaving aside the question of whether or not his conclusions on these preliminary questions are appropriate, his approach to the problem is the correct one.

Supreme Court of Canada Cases

To this point, there are only three Supreme Court decisions in which the issue of the relationship of s. 35 to provincial laws actually arises: *R. v. Badger*, *R. v. Côté* and *R. v. Sundown*. *Côté* is a Quebec case and *Badger* and *Sundown* are prairie cases involving hunting rights and the NRTA.

In *R. v. Côté*, the Court had to consider whether or not a provincial regulation infringed a treaty right to fish. Lamer C.J. observed from the outset that as the issue involved the alleged infringement of a treaty right, it was necessary to examine the provincial law in light of the protection provided to treaty rights by virtue of section 88 of the *Indian*

²⁰³At paragraph 38a of his judgment he says that *The Wildlife Act* provision “cannot be a provincial law of general application pursuant to section 88 . . . because the sale or barter of deer . . . is clearly reserved to the federal government by the provisions of the *Indian Act*”. This is not exactly accurate. What he must have meant is that while *The Wildlife Act* may be a law of general application, it is not incorporated by reference under section 88 because it conflicts with the other provisions of the *Indian Act*. In cases of such conflict, section 88 does not incorporate the provincial law by reference so that the provincial Act would not then apply to Indians.

Act. He set out the task of the court in this manner:

As a general rule, where a claimant challenges the application of a federal regulation under s. 35(1), the characterization of the right alternatively as an aboriginal right or as a treaty right will not be of any consequence once the existence of the right is established, as the *Sparrow* test for infringement and justification applies with the same force and the same considerations to both species of constitutional rights: *R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 37, 77, 78 and 79. However, in this instance, the appellants challenge a provincial regulation which allegedly restricts their aboriginal or treaty right to fish within the Z.E.C. [a control zone] by imposing a financial burden on their access to the land in question. As such, even if the Regulation respecting controlled zones is not found to infringe their constitutional rights unjustifiably under the *Sparrow* test for s. 35(1), if the right to fish is characterized as a treaty right, it may still be open to the appellants to challenge the provincial regulation under the federal statutory protection extended to aboriginal treaties under s. 88 of the *Indian Act*.²⁰⁴

This is an odd order in which to proceed. As already recounted, it has long been established that section 88 does not apply to those provincial laws that apply *ex proprio vigore*; it applies only to those provincial laws that would be otherwise read down.²⁰⁵ Thus, if it is necessary to refer to section 88 at all, it is because the provincial law in question bears on Indians in some essential respect and should be read down or is “in relation to” Indians and is otherwise *ultra vires*. It would be more logical to determine first of all if the provincial law is valid – either *ex proprio vigore* or by virtue of section 88 – and then, if it is, to proceed to the next question of whether or not it infringes Aboriginal or treaty rights.

²⁰⁴[1996] 4 C.N.L.R. 26, at 40-41.

²⁰⁵*R. v. Dick*, [1985] 2 S.C.R. 309.

Strangely, in addressing the issue of treaty rights and even after pointing out that section 88 operates so that “provincial laws which would otherwise not apply to Indians under the federal and provincial division of powers are made applicable as incorporated federal law”,²⁰⁶ the court was not moved to consider this preliminary jurisdictional point. It might be argued that this failure indicates an assumption by the Court that provincial laws may infringe such rights and still be valid. If that were true, however, there would be no need to consider first whether the *Sparrow* test for s. 35 was met and then to consider whether the provincial law interfered with a treaty so as to be precluded by section 88. In order to get to that second step, the provincial law must be one that is made operative by section 88 and would therefore, by definition, be inoperative in relation to Indians in any event. However, as the Court concluded that the provincial law in question did not infringe

²⁰⁶*R. v. Côté*, *supra* note 7 at para. 86. Lamer goes on to reflect on the protection afforded to treaty rights by section 88 as compared to s. 35:

But I note that, on the face of s.88, treaty rights appears to enjoy a broader protection from contrary provincial law under the *Indian Act* than under the *Constitution Act, 1982*. Once it has been demonstrated that a provincial law infringes “the terms of [a] treaty”, the treaty would arguably prevail over s.88 even in the presence of a well-grounded justification. The statutory provision does not *expressly* incorporate a justification requirement analogous to the justification stage required in the *Sparrow* framework. But the precise boundaries of the protection of s.88 remains a topic for future consideration. I know of no case that has authoritatively discounted the potential existence of an *implicit* justification stage under s.88. In the near future, Parliament will no doubt feel compelled to re-examine the existence and scope of this statutory protection in light of these uncertainties and in light of the parallel constitutionalization of treaty rights under s.35(1).

With respect, it appears that he has overlooked the fact that the effect of section 88 is to adopt as federal law certain provincial laws that would otherwise be invalid. That is, if section 88 did not exist, the provincial law would be invalid and the question of justification under s. 35 would not arise. However, infringing federal laws are permissible if they can be justified.

any Aboriginal or treaty rights, that specific question did not really come before it.

In *Badger*, the Court was called upon to consider the relationship between s. 35, provincial legislation relating to hunting, and the NRTA. Badger and two others were status Indians who had been convicted of shooting moose outside the permitted hunting season, contrary to the Alberta *Wildlife Act*, on certain private land within the territory covered by Treaty 8. The majority held that the treaty right to hunt for food was protected and expanded by virtue of the NRTA. Furthermore, while “the regulation of Indian hunting rights would ordinarily come within the jurisdiction of the Federal government and not the Province,” the issue of *vires* did not arise in respect of the provincial legislation in this case because of the NRTA:

It follows that by the terms of both the Treaty and the NRTA, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game. However, the provincial government’s regulatory authority under the Treaty and the NRTA did not extend beyond the realm of conservation. It is the constitutional provisions of s. 12 of the NRTA authorizing provincial regulations which make it unnecessary to consider s. 88 of the *Indian Act* and the general application of provincial regulations to Indians.²⁰⁷

In other words, under the NRTA, the prairie provinces have constitutional jurisdiction to legislate in relation to the hunting rights of Indians when the legislation they enact is for the purposes of conservation. The Court then went on to determine that the particular provincial law in question constituted a *prima facie* infringement of the treaty right

²⁰⁷*R. v. Badger*, [1996] 2 C.N.L.R. 77, at p. 104.

to hunt for food and that the infringement must be justified. While both Aboriginal and treaty rights are protected by s. 35, they are not absolute, and government infringement may be permissible if justification can be demonstrated. Justification is required because the honour of the Crown is engaged through the fact of entering into a treaty with the Indian peoples in which hunting rights were an important consideration:

The rights granted to Indians by treaties usually form an integral part of the consideration for the surrender of their lands. For example, it is clear that the maintenance of as much of their hunting rights as possible was of paramount concern to the Indians who signed Treaty No. 8. This was, in effect, an Aboriginal right recognized in a somewhat limited form by the treaty and later modified by the NRTA. To the Indians, it was an essential element of this solemn agreement.²⁰⁸

Thus, when the province succeeded to the position of federal power over Indian hunting by virtue of the constitutional amendments effected through the NRTA, it, too, was required to justify its laws. The court summarized its conclusion in this way:

[J]ustification of provincial regulations enacted pursuant to the NRTA should meet the same test for justification of treaty rights that was set out in *Sparrow*. The reason for this is obvious. The effect of s. 12 of the NRTA is to place the provincial government in exactly the same position which the federal Crown formerly occupied. Thus the provincial government has the same duty not to infringe unjustifiably the hunting right provided by Treaty 8 as modified by the NRTA. Paragraph 12 of the NRTA provides that the province may make laws for a conservation purpose, subject to the Indian right to hunt and fish for food. Accordingly, there is a need for a means to assess which conservation laws will if they infringe that right, nevertheless be justifiable. The *Sparrow* analysis provides a reasonable, flexible and current method of assessing conservation regulations and enactments.²⁰⁹

²⁰⁸*Ibid*, at p. 107.

²⁰⁹*Ibid*, at p. 111.

In other words, **provincial** power must be reconciled with the duty of the Crown,²¹⁰ but only when the province **has** power in respect of Indians is this possible.

In *R. v. Sundown*,²¹¹ John Sundown, a Cree Indian in Treaty 6 territory in Saskatchewan, was charged with constructing a permanent dwelling in a provincial park without a permit. He had built a log cabin in Meadow Lake Provincial Park as a hunting shelter, in accordance with traditional Cree hunting practices over that territory. His conviction was overturned on appeal. The principal issue on the appeal was whether or not the building of a log cabin could be viewed as reasonably incidental to the right to hunt. The Court held that it was. In so doing, it briefly considered the effect of paragraph 12 of the NRTA and concluded, as it did in *Badger*, that “provincial laws that pertain to conservation could properly restrict treaty rights to hunt provided they could be justified under *Sparrow*”.²¹² The significance of this concise summary of the ability of the province to legislate under paragraph 12 is the requirement that any such provincial laws must both be for the purposes of conservation and justifiable under *Sparrow*. Prior to *Badger*, it was

²¹⁰Justices Sopinka and Lamer dissented in respect of the relationship between the treaty and the NRTA. They were of the view that the NRTA replaces the treaty right to hunt for food and is thereby transformed into a constitutional right to which s. 35 does not apply. They would nevertheless apply the *Sparrow* test by analogy, as a useful means by which to balance the Indians’ right to hunt for food constitutionally protected in the NRTA with the province’s right to legislate in relation to conservation derived from the NRTA.

²¹¹[1999] 2 C.N.L.R. 289.

²¹²*Ibid*, at para 38.

thought that if a provincial law under paragraph 12 pertained to conservation, it was valid without any further examination. It is now clear that when provincial laws can be made in relation to Indians, they too must be justified; that is the import of s. 35.

It is clear then that provincial laws that infringe Aboriginal or treaty rights are indeed required to be justified under the framework established in *Sparrow*, but it is also clear in Saskatchewan that, except for laws enacted under the authority of paragraph 12 of the NRTA, provincial laws that infringe are invalid or, in the absence of section 88 of the *Indian Act* would be read down and thus apply only as federal law.²¹³ If that is correct, there is a very narrow range of jurisdiction that the province possesses and to which fiduciary-like obligations may attach.

²¹³I am not here referring to provincial laws extended by virtue of section 88 of the *Indian Act* because these laws apply only because of the exercise of federal jurisdiction. As such provincial laws apply to Indians in the province they are federal enactments. And the exercise of jurisdiction that must be justified is federal.

CHAPTER 6

CONCLUSION

This thesis began with the observation that the character of the relationship between the federal Crown and Aboriginal peoples had only been judicially recognized as being fiduciary in 1984, even though the fiduciary concept has existed in the law for at least 250 years. This characterization is most obviously apt in the facts and circumstances of the *Guerin* case, in which the fiduciary relationship was first declared to exist. It will be remembered that, in that case, reserve lands had been surrendered to federal authorities to be leased on the basis of a particular understanding about the nature of the lease that would be entered into on the Indians' behalf. However, federal officials entered into a very different lease arrangement, with significant negative financial consequences for the Musqueam Band.

The decision in *Guerin* did not put Aboriginal issues to rest, it awakened a host of new ones. Perhaps the first of these was the question of when fiduciary obligations would arise out of this newly recognized relationship. To begin with, the federal Crown argued that it was only in cases of surrenders of land that such obligations might exist. The Court determined very quickly that the relationship and the obligations arising out of it were not to be so narrowly construed as all that.

In *Kruger*,²¹⁴ for example, the Federal Court of Appeal held that fiduciary obligations were more far-reaching and existed in an expropriation context, as well as in the context of surrender. Still, however, it looked like the fiduciary relationship could be confined to matters tied to land. As early as 1983 (and independent of its fiduciary analysis of the relationship between the Crown and Aboriginal peoples), the Court had already determined that “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians”.²¹⁵

And then in 1990 the Supreme Court released its decision in *Sparrow*, clearly providing for the existence of the fiduciary relationship in a context reaching far beyond just land and issues surrounding Aboriginal title, invoking the fiduciary relationship as a means to reconcile “federal power” with “federal duty”. What then of the Aboriginal relationship with the provincial Crown? As we have seen, there have been very few cases in which provinces have been involved. In non-Aboriginal fiduciary contexts, the courts have stressed that it is the specific relationship that gives rise to specific fiduciary obligations. In other words, it is the specific circumstances of each particular relationship that define and refine the obligations that arise out of it. And while it is true that the relationship between the Crown and Aboriginal peoples has been described as *sui generis* or unique, it is nevertheless still fiduciary. As a result it must retain the essential elements of what it is to *be* fiduciary.

²¹⁴[1986] 1 F.C. 3.

²¹⁵*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36.

We can conclude that the essential ingredient of a fiduciary relationship is power and vulnerability. This is what the court recognized in *Sparrow*, by framing the constitutional reconciliation it sought between s. 91(24) and s. 35 as being a reconciliation of power and duty. But what power does a province have in relation to Aboriginal peoples? And what relationship?

In Saskatchewan, there is no historical/legal relationship between the Crown and First Nations. Treaties were negotiated by the federal Crown after Confederation and before the province was created. There were no obligations of the Imperial Crown that could devolve to the provinces via the division of powers in the manner suggested by some. Perhaps more importantly, though, the provincial Crown possesses virtually no power over Aboriginal peoples in their capacity as such.

As we have seen, in the case of laws that are applicable to Aboriginal peoples *ex proprio vigore*, the province is exercising the power that it has in relation to all people in the province. This type of an exercise of power is not about Aboriginal or treaty rights and there is therefore no reason why there should be any distinctions made in respect of Aboriginal peoples who are affected by such laws of general application. If these laws are to be valid provincial laws, they cannot be about Aboriginal peoples. And, if they're not, s.35 and any fiduciary relationship does not arise.

Laws that are of general application but that apply by virtue of s. 88 of the *Indian*

Act, on the other hand **are** about Aboriginal peoples and they apply because of federal power. They arise in the context of the relationship of Aboriginal peoples to the federal Crown. These laws are caught by s. 35 and can only infringe on Aboriginal or treaty rights if they can be justified. But it is federal legislative power that must be justified in such cases.

Laws that are applicable because of paragraph 12 of the NRTA are true exercises of provincial power in relation to Indians. The fiduciary relationship between Aboriginal peoples and the Crown provides the same limitation on the ability of the province to legislate as applies to the federal Crown in exercising power under s. 91(24). In this one limited case the province inherits the fiduciary obligations of the federal Crown as it wields the power that has been constitutionally devolved to it.

A provincial law that incidentally affects Aboriginal peoples in the limited sense permitted by the double aspect doctrine, is not an exercise of power over Indians by the province, and is not subject to fiduciary considerations. However, where there is a possibility that Aboriginal or treaty rights may be infringed by provincial actions, a failure to consult or to recognize Aboriginal priority can transform what would otherwise be an incidental effect into an infringement. Once the law infringes, it is invalid because it must be characterized as being in relation to a matter of federal jurisdiction. In this context, the doctrine of interjurisdictional immunity will render the law inapplicable to Aboriginal peoples. In this sense, *Sparrow* justification of provincial laws does not arise.

There is one other context in which the fiduciary relationship may be invoked, but that has not (yet) been placed before a court for its consideration: the negotiation of self-government agreements with Aboriginal peoples and the issues that may ultimately arise out of the agreements that are negotiated. Such negotiations are themselves a manifestation of the necessary reconciliation of power and duty that s. 35 requires. Canada has taken the position that an inherent right of self government is an existing Aboriginal right and is prepared to enter into agreements with Aboriginal peoples to give expression to that right.²¹⁶ To that end, a number of self-government negotiations have been concluded and an even larger number of negotiations are on-going.

Alan Pratt argues that provinces have an obligation to participate in these processes “to formalize and complete the treaty relationship and to reconcile honourably their laws and policies governing the use of Crown lands with the existence of Aboriginal title”.²¹⁷ Although not stated quite so explicitly, this view, or a similar one, appears to also be supported by Hutchins, Schulze and Hilling in their article “When Do Fiduciary Obligations to Aboriginal Peoples Arise?”²¹⁸ As we have also seen, Slattery and Rotman would also agree. But again the issue comes down to the question of what is the extent of provincial

²¹⁶See 1995 “Federal Policy Guide – Aboriginal Self-Government”, www.aicn-inac.gc.ca/pr/pub/sg/plcy_e.html

²¹⁷“The Problem of Extinguishment in the Numbered Treaties, A Discussion Paper for the Royal Commission on Aboriginal Peoples, May 10, 1995 (revised September 1996) at 77.

²¹⁸*Saskatchewan Law Review*, 1995, Vol. 59(1), 97-140 at 117-122.

power. If a province has no legislative ability to affect Aboriginal or treaty rights, why is its participation in self-government negotiations legally necessary?

Self-government agreements must be based on either Aboriginal or treaty rights.²¹⁹

In either case, the agreements recognize the exercise of a right of self-government, including jurisdiction to enact laws, within the framework that the agreement articulates. This is not to say that a right of self-government could not operate outside the agreed-upon framework, but the practical implementation of self-government will obviously work more smoothly in a recognized context. However, the recognition and affirmation contained in s. 35 does not require an explicit recognition and affirmation on behalf of other governments, legislatively or otherwise. The rights that s. 35 recognizes and affirms are those that existed at the time of its enactment in 1982 and these rights are whatever the courts may declare them to be, not just what other governments may agree to. And so in this context, the question is again, what provincial power must be reconciled with provincial duty?

²¹⁹One view is that self-government is an inherent right that arises out of the existence of a “people”. The federal government has recognized an inherent right, and if the right inheres in peoples it will by definition fall into the category of Aboriginal right. On the other hand, the recently concluded Nisga’a agreement, for example, is supported by both federal and provincial legislation that declares that “The Nisga’a Final Agreement is a treaty and a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*.” See *Nisga’a Final Agreement Act*, S.C. 2000, c. 7, s. 3 and *Nisga’a Final Agreement Act*, S.B.C. 1999, c. 2., s. 2. Others would argue that explicit constitutional amendments are required to give effect to new constitutional arrangements of powers, as in *Campbell v. British Columbia (Attorney General)*[2000] B.C.J. No. 1524 (B.C.S.C.), where the leader of the provincial Opposition argued that the Nisga’a treaty was unconstitutional.

As we have seen, the fiduciary obligations of the Crown are either a brake on legal powers that it exercises or a spur to exercise the powers that it can in order to ensure the honour of the Crown in the recognition and affirmation of Aboriginal and treaty rights that is provided by s. 35.²²⁰ The provinces have no ability to infringe Aboriginal or treaty rights, because they lack the jurisdiction to do so. A province that declines to reconcile its laws with the framework established in a self-government agreement – particularly one recognized by Parliament – will find its laws struck down or read down. Prudence and harmonious intergovernmental relations require provincial involvement, not the law.

²²⁰It will be remembered, also, that now Justice Binnie of the Supreme Court of Canada is of the view that the Crown can be forced into action by its fiduciary obligations and not just prevented from acting. See *supra* note 82.

BIBLIOGRAPHY

Legislation

Agreement between Ontario and Canada, Statutes of Canada, 54 & 55 Vict. c. 5 and Statutes of Ontario, 54 Vict. c. 3 (1894)

Canadian Charter of Rights and Freedoms, enacted as Schedule B to the *Canada Act, 1982*, (U.K.) 1982, c. 11

Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63 (U.K.)

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.)

Constitution Act, 1930, 20 & 21 Geo. V, c. 26 (U.K.)

Constitution Act, 1982, enacted as Schedule B to the *Canada Act, 1982*, (U.K.) 1982, c. 11

Indian Act, R.S.C., 1985, c. I-5

The Queen's Bench Act, 1998, S.S. 1998 c. Q-1.01

Rupert's Land and North-Western Territory Order, dated June 23, 1870

Saskatchewan Act, 1905, Statutes of Canada, 4 & 5 Edward VII, c. 42

Jurisprudence

Ontario (A.G.) v. Bear Island Foundation, [1991] 2 S.C.R. 570, [1991] 3 C.N.L.R. 79

Bell Canada v. Québec, [1988] 1 S.C.R. 749

Blueberry River Band v. Canada (DIAND), [1993] 3 F.C. 28 (Federal Court), [1995] 4 S.C.R. 344 (S.C.C.)

Bray v. Ford, [1896] A.C. 44 (H.L.)

Cadbury Schweppes Inc. v. F.B.I. Foods Ltd., [1999] 1 S.C.R. 142

Canson Enterprises Ltd. v. Boughton & Co. [1991] 3 S.C.R. 534

Cardinal v. A-G Alberta (1973), 7 C.N.L.C. 307

Chippewas of Sarnia Band v. Canada (Attorney General) [1999] O.J. No. 1406 (Ont. Sup. Ct. of Justice)

Cree Regional Authority v. Robinson, [1991] 4 C.N.L.R. 84 (F.C.T.D.)

Delgamuukw v. British Columbia, [1991] 3 W.W.R. 97, [1993] 5 W.W.R. 97 (B.C.C.A.), [1997] 3 S.C.R. 1010 (S.C.C.)

Derrickson v. Derrickson, [1986] 1 S.C.R. 285

Fairford First Nation v. Canada (Attorney General) [1998] F.C.J. No. 1632

Four B Manufacturing Ltd. v. United Garment Workers of America, [1980] 1 S.C.R. 1031

Frame v. Smith, [1987] 2 S.C.R. 99

Francis v. Canada Labour Relations Board, [1981] 1 F.C. 225

Gardner v. The Queen in Right of Ontario, [1984] 45 O.R. 760, (1984) 7 D.L.R. (4th) 464

General Motors of Canada Ltd. v. City National Leasing (1989), 58 D.L.R. (4th) 255

Gitanyow First Nation v. Canada, [1999] B.C.J. No. 1258

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481

Halfway River v. British Columbia, [1999] 9 W.W.R. 645

Heydon's Case (1584) 76 E.R. 637

Hodge v. The Queen (1883), 9 App. Cases. 117

Hodgkinson v. Simms, [1994] 3 S.C.R. 377

K.M. v. H.M., [1992] 3 S.C.R. 6

Keech v. Sandford (1726), Sel. Cas. T. King 61, (1726) 25 E.R. 223

Kitkatla Band v. British Columbia (Small Business, Tourism and Culture), [2000] B.C.J. No. 86

Kruger and Manuel v. R., [1978] 1 S.C.R. 104

Lac La Ronge Indian Band v. Canada, [2000] 1 C.N.L.R. 245

LAC Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574

McInerney v. MacDonald, [1992] 2 S.C.R. 138

Mitchell v. Peguis Band, [1990] 2 S.C.R. 85

Norberg v. Wynrib [1992] 2 S.C.R. 226

Nowegijick v. The Queen, [1983] 1 S.C.R. 29

Ontario Mining Company and Attorney General for Canada v. Seybold and Attorney General for Ontario, [1903] A.C. 73 (P.C.)

Paul v. C.P.R., [1988] 2 S.C.R. 654

R. v. Adams, [1996] 3 S.C.R. 101

R. v. Alphonse, [1993] 5 W.W.R. 401 (B.C.C.A.)

R. v. Badger, [1996] 1 S.C.R. 771, [1996] 4 W.W.R. 457

R. v. Catarat, [1999] 4 C.N.L.R. 139 (Sask. Q.B.)

R. v. Cote, [1996] 3 S.C.R. 139

R. v. Coullonheur, [1997] 1 C.N.L.R. 130 (Sask. Prov. Ct.)

R. v. Dick, [1985] 2 S.C.R. 309

R. v. Gladstone, [1996] S.C.R. 723

R v. Hill (1907), 5 O.L.R. 406 (C.A.)

R. v. Ironeagle, [2000] 2 C.N.L.R. 163 (Sask. Prov. Ct.)

R. v. Jim (1915), 4 C.N.L.C. 328

R. v. Janvier, [1995] 4 C.N.L.R. 29 (Sask. Prov. Ct.)

R. v. Keepness, [2000] 2 C.N.L.R. 195, reversed [2001] S.J. No. 142

R. v. Lewis, [1996] 1 S.C.R. 921, [1996] 5 W.W.R. 348

R. v. Marshall, [1999] S.C.J. No. 55

R. v. McIntyre, [1990] S.J. No. 694

R. v. N.T.C. Smokehouse, [1996] 2 S.C.R. 672

R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta and Others, [1982] 1 Q.B. 892 (C.A.)

R. v. Sparrow, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410

R. v. Sundown, [1999] 2 C.N.L.R. 289

R. v. Van der Peet, [1996] 2 S.C.R. 507 (S.C.C.)

Re Paulette's Application, [1973] 6 W.W.R. 97

Re Treaty No. 3 Annuities, [1910] A.C. 637 (P.C.)

Roberts v. Canada (1995), 99 F.T.R. 1 (Fed. Ct. T.D.), [1989] 1 S.C.R. 322.

Robinson Treaties Annuities, [1897] A.C. 199 (P.C.)

Semiahmoo Indian Band v. Canada [1998] 1 F.C. 3

SIGA v. CAW – Canada, [2000] 8 W.W.R. 338 (Sask. Q.B.)

Simon v. The Queen, [1985] 2 S.C.R. 387

St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 A.C. 46 (P.C.)

Smith v. R., [1983] 1 S.C.R. 554

Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd. (1997), 198 A.R. 241(Q.B.), [1999] 6 W.W.R. 483 (C.A.), leave to appeal to the Supreme Court of Canada dismissed, [1999]

S.C.C.A. No. 316.

Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan et al. (1982), 135 D.L.R. (3d) 128

Secondary Materials : Monographs

Dickason, Olive Patricia, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland and Stewart, 1992)

Funston, Bernard W. & Eugene Meehan, *Canadian Constitutional Documents Consolidated* (Toronto: Carswell, 1994)

Gruending, Dennis, ed., *The Middle of Nowhere: Rediscovering Saskatchewan* (Saskatoon: Fifth House Publishers, 1996)

Isaac, Thomas, *Aboriginal Law: Cases, Materials and Commentary* 2nd ed., (Saskatoon: Purich Publishing, 1999)

Jenish, D'Arcy, *Indian Fall: The Last Great Days of the Plains Cree and the Blackfoot Confederacy* (Toronto: Penguin Canada, 1999)

Morse, B., ed. *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1991)

Morrow, W.H., ed., *Northern Justice: The Memoirs of Mr. Justice William G. Morrow*, (Jointly published by the Osgoode Society for Canadian Legal History and the Legal Archives Society of Alberta, 1995)

Rotman, Leonard Ian, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996)

Slattery, Brian, "First Nations and the Constitution: A Question of Trust", (1992) *Canadian Bar Review*, Vol. 71, No. 2, 261 - 293

Smith, David E., *The Invisible Crown: The First Principle of Canadian Government*, (Toronto: University of Toronto Press, 1995)

Wright, Ronald, *Stolen Continents: The New World Through Indian Eyes Since 1492*, (Toronto: Viking, 1991)

Secondary Material: Articles

Arnot, David M., "The Honour of the Crown" (1996) 60(2) Sask.L. Rev. ?

Bell, Catherine, "The Promise of *Marshall* on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63(2) Sask. L. Rev. 667

Binnie, W.I.C., "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1991) 15 Queen's L. J. 217

Cowen, Jan, "Difference, Dominance, Dilemma: A Critical Analysis of *Norberg v. Wynrib*" (1994) 58(2) Sask. L. Rev. 357

Dickason, Olive P., "Making Claim" (2000) February/March *The Beaver* 38

Griffiths, Owen B., "Case Comment on *Blueberry River*: Is the Crown Fiduciary Obligation in the Currents of Change?", [1996] 3 C.N.L.R. 25

Henderson, James Youngblood, "Empowering Treaty Federalism" (1994) 58(2) Sask. L. Rev. 241

Henderson, James Youngblood, "Constitutional Powers and Treaty Rights" (2000) 63(2) Sask. L. Rev. 719

Hogg, Peter and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74(2) Can. Bar. Rev. 187

Hutchins, Peter, and David Schulze with Carol Hilling, "When Do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59(1) Sask. L. Rev. 97

Isaac, Thomas, "Balancing Rights: The Supreme Court of Canada, *R. v. Sparrow*, and the Future of Aboriginal Rights" (1993) 2 *The Canadian Journal of Native Studies* XIII, 199

Isaac, Thomas, "The Courts, Government, and Public Policy: The Significance of *R. v. Marshall*" (2000) 63(2) Sask. L. Rev. 701

Klinck, Dennis R., "Fiduciary Obligations", a paper presented to the Saskatchewan Branch of the Canadian Bar Association at its Mid-winter meeting January 30 and 31, 1992, Regina

Lawrence, Sonia and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and The Crown's Duty to Consult" (2000) 79(1) Can. Bar Rev. 252

Narvey, Kenneth M., "The Royal Proclamation of 7 October 1763, the Common Law, and

Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1974) 38 Sask. L. Rev. 123

Newman, Dwight, "The Limitation of Rights: A Comparative Evolution of Ideology of the *Oakes* and *Sparrow* Tests" (1999) 62(2) Sask. L. Rev. 543

Normey, Robert, "Angling for 'Common Intention': Treaty Interpretation in *R. v. Marshall*, (2000) 63(2) Sask. L. Rev. 645

Pratt, Alan, "The Problem of Extinguishment in the Numbered Treaties", A Discussion Paper for the Royal Commission on Aboriginal Peoples, May 10, 1995 (revised September 1996)

Pratt, Alan, "Discussion Paper Regarding the Natural Resources Transfer Agreements of the Prairie Provinces", prepared for the Royal Commission on Aboriginal Peoples, May 27, 1994

Rotman, Leonard I., "'My Hovercraft is Full of Eels': Smoking Out the Message in *R. v. Marshall*, (2000) 63(2) Sask. L. Rev. 617

Rotman, Leonard I., "Balancing the 'Scales of Justice': Fiduciary Obligations and *Stewart v. C.B.C.*", (1999) 78(3 & 4) Can. Bar Rev. 445

Salembier, J. Paul, "Crown Fiduciary Duty, Indian Title, and the Lost Treasure of I.R. 172: The Legacy of *Apsassin v. The Queen*", [1996] 3 C.N.L.R. 1

Sanders, D.E., "Hunting Rights – Provincial Laws – Application on Indian Reserves", (1974) 38 Sask. L. Rev. 234

Slattery, Brian, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727

Walker, Janet, "Shawanaga Bound: The Ontario Court of Appeal Decides *Hopton v. Pamajewon*" (1994) 58(1) Sask. L. Rev. 161

Weinrib, E., "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1

Wetzel, Jerry, "Liberal Theory as a Tool of Colonialism and the Forced Assimilation of the First Nations of Newfoundland and Labrador," [1995] 4 Dalhousie Journal of Legal Studies 105

APPENDIX A

Alphabetical Table of Aboriginal Fiduciary Cases at the Appellate Level in Canada¹

Animal Alliance of Canada v. Canada (Attorney General)

[2000] F.C.J. No. 1419
Federal Court of Appeal
Sharlow
September 7, 2000

Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band

[1997] 1 F.C. 689; [1996] F.C.J. No. 1486
Federal Court of Appeal
Stone, Linden and McDonald
November 20, 1996

[1999] S.C.J. No. 24; [1999] 2 S.C.R. 203, [1999] 3 C.N.L.R. 19
Supreme Court of Canada
Lamer, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie
May 20, 1999

Bear Island Foundation v. Ontario

[1999] O.J. No. 4290
Ontario Court of Appeal
Doherty, Laskin and Charron
November 15, 1999

Bear Island Foundation v. Ontario (Attorney General)

[1991] 2 S.C.R. 570; [1991] S.C.J. No. 61
Supreme Court of Canada
Lamer, La Forest, Gonthier, McLachlin and Stevenson
August 15, 1991

Blueberry River Indian Band v. Canada (DIAND)

[1993] F.C.J. No. 116
Federal Court of Appeal

¹Methodological Note: These cases were identified through the use of a key word search of “aboriginal & fiduciary” on Canadian Judgments in the QuickLaw database as at December 31, 2000.

Isaac C.J., Marceau and Stone JJ.A.
February 9, 1993

[1995] 4 S.C.R. 344; [1995] S.C.J. No. 99
Supreme Court of Canada
La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Major
December 14, 1995

British Columbia (Attorney General) v. Mount Currie Indian Band
[1991] B.C.J. No. 694; 54 B.C.L.R. (2d) 156
British Columbia Court of Appeal
Anderson, Toy, Southin, Proudfoot and Hinds JJ.A.
March 25, 1991

British Columbia (Attorney General) v. Mount Currie Indian Band
[1991] B.C.J. No. 207
British Columbia Court of Appeal (In Chambers)
Macfarlane
January 28, 1991

British Columbia (Deputy Sheriff) v. Canada
[1992] B.C.J. No. 810, [1992] 4 W.W.R. 432
British Columbia Court of Appeal
Carrothers, Lambert and Taylor
April 10, 1992

Canada (Attorney General) v. Aluminum Co. of Canada Ltd.
[1987] B.C.J. No. 164; 35 D.L.R. (4th) 495
British Columbia Court of Appeal
Seaton, Hinkson and Macfarlane
February 11, 1987

Canada (Attorney General) v. Fontaine
[1996] M.J. No. 96
Manitoba Court of Appeal
Huband, Lyon and Helper
February 15, 1996

Canada v. Fort Alexander Indian Band
[1991] F.C.J. No. 104; 121 N.R. 237
Federal Court of Appeal
Mahoney, MacGuigan and Linden
February 6, 1991

Canada (Attorney General) v. Spencer

[2000] S.J. No. 514; 2000 SKCA 96

Saskatchewan Court of Appeal

Vancise, Lane and Jackson

August 29, 2000

Canadian National Railway Co. v. Matsqui Indian Band

[1998] F.C.J. No. 983

Federal Court of Appeal

Stone, Denault and Décary

July 2, 1998

Leave to appeal to the Supreme Court of Canada dismissed March 25, 1999

Canadian Pacific Ltd. v. Matsqui Indian Band

[2000] 1 F.C. 325, [1999] F.C.J. No. 1057

Federal Court of Appeal

Marceau, Desjardins and Robertson

Ottawa, June 25, 1999

Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)

[1992] 3 F.C. 316, [1992] F.C.J. No. 405

Federal Court of Appeal

Heald, Marceau, and Linden

May 8, 1992

Leave to appeal to the Supreme Court of Canada dismissed February 4, 1993

Chippewas of Kettle & Stony Point v. Canada (Attorney General)

31 O.R. (3d) 97, [1996] O.J. No. 4188

Court of Appeal for Ontario

Brooke, Osborne and Laskin

December 2, 1996

[1998] 1 S.C.R. 756; [1998] S.C.J. No. 36

Supreme Court of Canada

Lamer, Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache

May 19, 1998

Chippewas of Sarnia Band v. Canada (Attorney General)

[2000] O.J. No. 138

Ontario Court of Appeal

Doherty, Charron and O'Connor

January 27, 2000

Cree Regional Authority v. Canada (Federal Administrator)

[1991] F.C.J. No. 426, [1991] 3 C.N.L.R. 82; [1991] 3 F.C. 533

Federal Court of Appeal

Hugessen, MacGuigan and Décary

May 14, 1991

Delgamuukw v. British Columbia

[1993] B.C.J. No. 1395

British Columbia Court of Appeal

Macfarlane, Taggart, Lambert, Hutcheon and Wallace

June 25, 1993

[1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108

Supreme Court of Canada

Lamer, La Forest, L'Heureux-Dubé, Cory, McLachlin and Major

December 11, 1997

Dumont v. Canada (Attorney General)

[1991] M.J. No. 621

Manitoba Court of Appeal

Scott, Huband and Twaddle

December 30, 1991

Eastmain Band v. Canada (Federal Administrator)

[1993] 1 F.C. 501, [1992] F.C.J. No. 1041

Federal Court of Appeal

Marceau, Décary and Létourneau

November 20, 1992

Leave to appeal to Supreme Court of Canada dismissed October 14, 1993

Enoch Band of Stony Plain Indians v. Canada

[1993] F.C.J. No. 1254

Federal Court of Appeal

Heald, Décary and Linden

November 18, 1993

Guerin v. Canada

[1982] F.C.J. No. 1119

Federal Court of Appeal

Le Dain, Heald and Culliton

December 10, 1982

[1984] 2 S.C.R. 335
Supreme Court of Canada
Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson
November 1, 1984

Halfway River First Nation v. British Columbia (Ministry of Forests)

[1999] B.C.J. No. 1880
British Columbia Court of Appeal
Southin, Finch and Huddart
August 12, 1999

Imperial Oil Resources Ltd. v. Canada (Minister of Indian Affairs and Northern Development)

[1998] F.C.J. No. 1708
Federal Court of Appeal
Isaac
November 16, 1998

Kitkatla Band v. British Columbia (Minister of Forests)

[1998] B.C.J. No. 1598
British Columbia Court of Appeal
Southin (In Chambers)
June 25, 1998

Kitkatla Band v. British Columbia (Small Business, Tourism and Culture)

[2000] B.C.J. No. 86
British Columbia Court of Appeal
Prowse, Braidwood and Hall
January 19, 2000
Application for leave to appeal entitled "constitutional application" granted August 17, 2000

Kruger et al. v. The Queen

[1986] 1 F.C. 3
Federal Court of Appeal
Heald, Urie and Stone
March 18, 1985

Mitchell v. Peguis Indian Band

[1990] 2 S.C.R. 85, [1990] S.C.J. No. 63
Supreme Court of Canada
Dickson, Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka and Gonthier
June 21, 1990

Montana Band v. Canada

[1992] F.C.J. No. 936

Federal Court of Appeal

Marceau, Stone and Létourneau

October 8, 1992

Leave to appeal to the Supreme Court of Canada dismissed May 27, 1993

Montana Band v. Canada

[1991] F.C.J. No. 76, [1991] 2 C.N.L.R. 88, [1991] 2 F.C. 30

Federal Court of Appeal

Heald, Hugessen and Stone

February 18, 1991

Application for leave to appeal to Supreme Court of Canada dismissed August 22, 1991

Montana Band of Indians v. Canada

[1991] 2 F.C. 30, [1991] F.C.J. No. 76

Federal Court of Appeal

Heald, Hugessen and Stone

February 18, 1991

Musqueam Indian Band v. Glass and Her Majesty The Queen

[2000] S.C.J. No. 54

Supreme Court of Canada

McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel

November 9, 2000

Musqueam Indian Band v. Glass

[1999] 2 F.C. 138, [1998] F.C.J. No. 1893

Federal Court of Appeal

Desjardins, Robertson and Sexton

December 21, 1998

[2000] S.C.J. No. 54

Supreme Court of Canada

McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel

November 9, 2000

Opetchesaht Indian Band v. Canada

[1997] 2 S.C.R. 119, [1997] S.C.J. No. 50

Supreme Court of Canada

Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and

Major
May 22, 1997

Osoyoos Indian Band v. Oliver (Town)

[1999] B.C.J. No. 997
British Columbia Court of Appeal
Lambert, Prowse and Newbury
May 4, 1999
Leave to appeal to Supreme Court of Canada granted April 20, 2000

Paul v. CP

[1988] 2 S.C.R. 654, [1988] S.C.J. No. 98
Supreme Court of Canada
Dickson C.J. and Beetz, McIntyre, Lamer and Wilson
December 15, 1988

Perry v. Ontario

33 O.R. (3d) 705, [1997] O.J. No. 2314
Court of Appeal for Ontario
Finlayson, Labrosse and Laskin
June 5, 1997

Quebec (Attorney General) v. Canada (National Energy Board)

[1994] 1 S.C.R. 159, [1994] S.C.J. No. 13
Supreme Court of Canada
Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major
February 24, 1994

R. v. Adams

[1996] 3 S.C.R. 101, [1996] S.C.J. No. 87
Supreme Court of Canada
Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
October 3, 1996

R. v. Alphonse

[1993] B.C.J. No. 1402
British Columbia Court of Appeal
Taggart, Lambert, Hutcheon, Macfarlane and Wallace
June 25, 1993

R. v. Badger

[1996] 1 S.C.R. 771, [1996] S.C.J. No. 39
Supreme Court of Canada
Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci
April 3, 1996

R. v. Côté

[1996] 3 S.C.R. 139, [1996] S.C.J. No. 93
Supreme Court of Canada
Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci,
Major
October 3, 1996

R. v. Gladstone

[1996] 2 S.C.R. 723, [1996] S.C.J. No. 79
Supreme Court of Canada
Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci,
Major
August 21, 1996

R. v. Jack

[1995] B.C.J. No. 2632
British Columbia Court of Appeal
Legg, Hinds and Rowles
December 20, 1995

R. v. Lewis

[1993] B.C.J. No. 1398
British Columbia Court of Appeal
Taggart, Lambert, Hutcheon, Macfarlane and Wallace
June 25, 1993

[1996] 1 S.C.R. 921; [1996] S.C.J. No. 46
Supreme Court of Canada
Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and
Major
April 25, 1996

R. v. Little

[1995] B.C.J. No. 2633
British Columbia Court of Appeal
Legg, Hinds and Rowles
December 20, 1995

R. v. Marshall

[1997] N.S.J. No. 131
Nova Scotia Court of Appeal
Roscoe, Bateman and Flinn
March 26, 1997

[1999] 3 S.C.R. 456; [1999] S.C.J. No. 55
Supreme Court of Canada
Lamer, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Binnie
September 17, 1999

R. v. Marshall

[1999] 3 S.C.R. 533, [1999] S.C.J. No. 66
Supreme Court of Canada
Lamer, L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and Binnie
MOTION FOR REHEARING AND STAY
November 17, 1999

R. v. McIntyre

[1992] S.J. No. 302, [1992] 4 W.W.R. 765
Saskatchewan Court of Appeal
Cameron, Wakeling and Gerwing
April 7, 1992
Leave to appeal to Supreme Court of Canada dismissed December 10, 1992

R. v. N.T.C. Smokehouse Ltd.

[1996] 2 S.C.R. 672, [1996] S.C.J. No. 78
Supreme Court of Canada
Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major
August 21, 1996

R. v. Sparrow

[1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49
Supreme Court of Canada
Dickson, McIntyre, Lamer, Wilson, LaForest, L'Heureux-Dubé and Sopinka
May 31, 1990

R. v. Van der Peet

[1993] B.C.J. No. 1401
British Columbia Court of Appeal
Taggart, Lambert, Hutcheon, Macfarlane and Wallace
June 25, 1993

[1996] 2 S.C.R. 507, [1996] S.C.J. No. 77
Supreme Court of Canada
Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci
Major
August 21, 1996

R. v. Vincent

12 O.R. (3d) 427
Court of Appeal for Ontario
Lacourcière, Galligan and Labrosse
January 22, 1993
Leave to appeal to Supreme Court of Canada dismissed October 14, 1993

R. v. Wolfe

[1995] S.J. No. 501
Saskatchewan Court of Appeal
Vancise, Gerwing and Jackson
September 12, 1995
Leave to appeal to Supreme Court of Canada dismissed July 4, 1996

Roberts v. Canada

[1999] F.C.J. No. 1529
Federal Court of Appeal
Isaac, Linden and McDonald
October 12, 1999

[1989] 1 S.C.R. 322; [1989] S.C.J. No. 16
Supreme Court of Canada
Dickson, Beetz, Lamer, Wilson
March 9, 1989

Ross River Dena Council Band v. Canada

[1999] Y.J. No. 121
Yukon Territory Court of Appeal
Richard, Finch and Hudson
December 15, 1999
Leave to appeal to Supreme Court of Canada granted August 10, 2000

Ryan v. British Columbia (Ministry of Forests, District Manager)

[1994] B.C.J. No. 194
British Columbia Court of Appeal (In Chambers)
Legg
February 1, 1994

Samson Indian Nation and Band v. Canada

[1998] 2 F.C. 60, [1997] F.C.J. No. 1449

Federal Court of Appeal

Stone, Desjardins and McDonald

October 27, 1997

Samson Indian Nation and Band v. Canada

[1995] 2 F.C. 762, [1995] F.C.J. No. 734

Federal Court of Appeal

Pratte, MacGuigan and Décary

May 12, 1995

Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)

[2000] B.C.J. No. 1916

British Columbia Court of Appeal

Southin, Rowles and Mackenzie

September 26, 2000

Leave to appeal to Supreme Court of Canada filed November 27, 2000

Skerryvore Ratepayers' Assn. v. Shawanaga Indian Band

16 O.R. (3d) 390, [1993] O.J. No. 2975

Court of Appeal for Ontario

Krever and Arbour JJ.A.

December 9, 1993

Leave to appeal to Supreme Court of Canada dismissed May 12, 1994

Smiahmoo Indian Band v. Canada

[1998] 1 F.C. 3, [1997] F.C.J. No. 842

Federal Court of Appeal

Isaac, McDonald, and Gray

June 24, 1997

Taku River Tlingit First Nation v. Tulsequah Chief Mine Project

[2000] B.C.J. No. 2024

British Columbia Court of Appeal (In Chambers)

Huddart J.A.

October 12, 2000

Transcanada Pipelines Ltd. v. Beardmore (Township)

[2000] O.J. No. 1066

Ontario Court of Appeal

Weiler, Goudge and Borins JJ.A.

April 5, 2000; Amended judgment: July 11, 2000

Leave to appeal to Supreme Court of Canada dismissed October 19, 2000

Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)

[2000] 2 F.C. 314, [1999] F.C.J. No. 1767

Federal Court of Appeal

Décary, Robertson and Noël

November 17, 1999

Tsawout Indian Band v. Saanichton Marina Ltd.

[1989] B.C.J. No. 563

British Columbia Court of Appeal

Hinkson, Lambert and Locke

March 30, 1989

Watt v. Liebelt

[1999] 2 F.C. 455, [1998] F.C.J. No. 1931

Federal Court of Appeal

Strayer, Décary and Linden

December 30, 1998

West Moberly First Nations v. Canada (National Energy Board)

[1995] S.C.C.A. No. 526

Supreme Court of Canada

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Leave to appeal dismissed with costs June 6, 1996

Westar Timber Ltd. v. Gitksan Wet'suwet'en Tribal Council

[1989] B.C.J. No. 1077

British Columbia Court of Appeal

Carrothers, Esson and Locke

June 9, 1989

APPENDIX B

CHRONOLOGICAL TABLE

Aboriginal Fiduciary Cases at the Appellate Level in Canada

Guerin v. Canada

Federal Court of Appeal

December 10, 1982

The Court upheld the judgment of the Trial Division, which declared the federal Crown to be in breach of trust in respect of the leasing by it in 1958 of about 162 acres of surrendered land in the Musqueam Indian Reserve No. 2 in Vancouver. The word “fiduciary” has not yet been used in the Aboriginal context.

Guerin v. Canada

Supreme Court of Canada

November 1, 1984

The Supreme Court finds that the relationship between the Crown and Aboriginal peoples is fiduciary in nature, and out of the relationship fiduciary obligations arise. The relationship is based on the Crown’s interposing of itself between Aboriginal peoples and European settlers (as acknowledged in the Royal Proclamation and the *Indian Act*) and the inalienability of Aboriginal title except to the Crown. The case involves the federal Crown’s dealings with surrendered reserve lands.

Kruger et al. v. The Queen

Federal Court of Appeal

March 18, 1985

Action was taken against the federal Crown in respect of reserve lands that were originally expropriated when the rent requested was considered by the Department of Transport to be too high. Later the lands were surrendered. The action was brought for breach of trust. The fact of the existence of the fiduciary relationship is not challenged. Fiduciary obligations arising out of it are extended to include the expropriation situation.

Canada (Attorney General) v. Aluminum Co. of Canada Ltd.

British Columbia Court of Appeal

February 11, 1987

The Indian plaintiffs allege that the Minister of Fisheries has a constitutional authority to regulate water flows from Alcan's dams and a fiduciary obligation to the

Indians to exercise that authority for the restoration and protection of their interests in the fishery. The chambers judge had granted the B.C. Wildlife Federation intervenor status. Alcan and the Attorney General of British Columbia appealed and the appeal was allowed. Although the fiduciary obligations of the federal Crown were pleaded by the Indian plaintiffs, this was a procedural motion and those issues were not discussed by the court.

Paul v. CP

Supreme Court of Canada

December 15, 1988

CP obtained a permanent injunction to restrain an Indian Band from blocking its line where it crossed the reserve. Because CP's 1890 lease had been confirmed and ratified by both the provincial legislature and the federal Parliament, the legislation amounted to an acknowledgment that permission had been given for the railway to be built where it was. It was an open question as to whether the government of New Brunswick had failed to carry out any obligations to the Band it may have had – whatever those might have been. The existence of the fiduciary relationship, as established in *Guerin*, and the fact that obligations arise out of it was noted by the Court, but this had no impact on the decision regarding the injunction.

Roberts v. Canada

Supreme Court of Canada

March 9, 1989

A dispute arose between two Indian bands relating to use and occupation of a reserve. One of the Bands sought a declaration against the federal Crown that it had the right to use and occupy the reserve and a permanent injunction against the other Band to restrain its members from trespassing on the reserve, alleging that the Crown breached its fiduciary duty to protect and preserve the Band's interest in that reserve. The Supreme Court held that the Federal Court had jurisdiction to hear the claim because the law of aboriginal title is federal common law. There was no discussion about the nature of the fiduciary relationship or the obligations arising out of it.

Tsawout Indian Band v. Saanichton Marina Ltd.

British Columbia Court of Appeal

March 30, 1989

Saanichton Marina Ltd. proposed to build a marina on Saanichton Bay Pursuant to a license of occupation granted by British Columbia. The Tsawout Indian Band opposed the construction of the marina on the grounds that it would interfere with their right of fishery in Saanichton Bay, granted by treaty with Governor Douglas of

the colony of British Columbia in 1852. The court held that the grant of the license of occupation by the provincial Crown to Saanichton Marina interfered with the treaty right of the Indians and the construction of the marina would derogate from their treaty rights. The province could not act to contravene the treaty rights of Indians, nor could it authorize others to do so. As a breach of treaty rights, the province's actions could not be saved by section 88 of the *Indian Act*. The Court's liberal interpretation of the treaty was based on the principles established in *Nowegijick*. The court did not engage in any particular discussion of the fiduciary relationship or its application to the provincial Crown.

Westar Timber Ltd. v. Gitksan Wet'suwet'en Tribal Council

British Columbia Court of Appeal

June 9, 1989

These appeals were taken in relation to interlocutory orders of injunctive relief in "satellite proceedings" accompanying the *Delgamu'ukw* litigation. The case deals with the appropriateness of interim injunctions and does not discuss fiduciary relationships or obligations.

R. v. Sparrow

Supreme Court of Canada

May 31, 1990

Sparrow was charged with a contravention of the federal fishery regulations. The Court held that, while Aboriginal and treaty rights protected by s. 35 were not absolute, because of the fiduciary relationship between the Crown and aboriginal peoples, s. 35 required that there be a reconciliation between "federal power" and "federal duty". That is the federal government was not free to pass any laws it wished under s. 91(24); if those laws infringed Aboriginal or treaty rights they would have to be justified in a context of upholding the honour of the Crown.

Mitchell v. Peguis Indian Band

Supreme Court of Canada

June 21, 1990

The Government of Manitoba settled the Band's claim in respect of an invalid provincial tax levied on reserve. The Appellants were creditors of the Band and obtained a prejudgment garnishing order against the settlement to the extent of their fees for representing the Indians in the settlement negotiations. The court set aside the garnishing order. Personal property given pursuant to treaty and deemed to be on a reserve is not subject to attachment by a non-Indian because the words "Her Majesty" in s. 90(1)(b) of the *Indian Act* include not only the federal Crown but also the provincial Crown. The case contains only a passing reference to the fiduciary

relationship in the context of referring to the *Guerin* case.

British Columbia (Attorney General) v. Mount Currie Indian Band

British Columbia Court of Appeal (In Chambers)

January 28, 1991

The province argued that it held title to the land on which a provincial highway , built in 1947, running through the Indian Reserve was located. The Indian Band argued that the land was part of the Reserve and that the Province had no right to encroach on Reserve lands. The Province based its position on a reservation contained in its conveyance of certain lands to the federal government in 1938. Several Bands sought to intervene. There was no discussion of the fiduciary relationship.

Canada v. Fort Alexander Indian Band

Federal Court of Appeal

February 6, 1991

The action was originally commenced by statement of claim by the respondent on his own behalf and on behalf of the members of the Fort Alexander Indian Band. The suit alleged breach of fiduciary obligations on the part of the federal Crown. The issue before the court was a jurisdictional one, and didn't discuss the nature of the fiduciary relationship.

Montana Band v. Canada

Federal Court of Appeal

February 18, 1991

In 1868, the Imperial Parliament passed the *Rupert's Land Act, 1868*, enabling Her Majesty to accept a surrender from the Hudson's Bay Company of its lands, privileges and rights in Rupert's Land. On May 28, 1869, the Senate and the House of Commons passed a resolution calling on the Canadian Government to provide for the "protection of the Indian tribes whose interests and well-being are involved in the transfer". Rupert's Land and the North-Western Territory became part of Canada as of July 15, 1870 (the Rupert's Land Order). The Band sought declarations that by virtue of the *Constitution Act, 1867*, the terms, conditions and obligations of the Rupert's Land Order became constitutional instruments binding on Canada and therefore part of the Constitution of Canada and that the undertaking given by Canada in 1869 entails a fiduciary obligation to them. Their claim was struck on a motion for that purpose, but their appeal was allowed on the basis that the issues raised by them were real and not theoretical, they had a vital and real interest in those issues and because the Crown was the proper contradictor, with a true interest in opposing the declarations sought, without having to show a breach of the alleged

fiduciary obligation.

British Columbia (Attorney General) v. Mount Currie Indian Band

British Columbia Court of Appeal

March 25, 1991

The case was an appeal from a judgment granting the Crown an interlocutory injunction preventing the obstruction of traffic on a road passing through the Indian reserve. The appeal was dismissed on the basis that the Crown had an arguable case that should go to trial. There was no discussion of the fiduciary relationship. The word was contained in a quotation from *Guerin* by Southin JA in dissent.

Cree Regional Authority v. Canada (Federal Administrator)

Federal Court of Appeal

May 14, 1991

The issue was whether or not the federal Court had jurisdiction to entertain an application for a mandamus against the federal administrator appointed by an Order in Council specifying the James Bay and Northern Québec Agreement as authority. According to its principal provisions and guidelines, the Agreement was intended to be legislated into effect by both Canada and Quebec and to derive all legal force, even as contract, from laws giving it effect and validity. The court held that the administrator was a “federal board”. There was no discussion of the fiduciary relationship.

Ontario (Attorney General) v. Bear Island Foundation

Supreme Court of Canada

August 15, 1991

After the Bear Island Foundation had registered cautions against tracts of unceded land on behalf of the Temagami Band of Indians, Ontario sought a declaration that the Crown in right of Ontario had clear title. The Foundation then counterclaimed and sought a declaration of quiet title by virtue of the Temagami’s Aboriginal rights in the land. The trial judge found that the Temagami had no Aboriginal right to the land, and that even if such a right had existed, it had been extinguished by the Robinson-Huron Treaty of 1850, to which the Temagami band was originally a party or to which it had subsequently adhered. The Crown breached its fiduciary obligations to the Indians by failing to comply with some of its obligations under this agreement.

Dumont v. Canada (Attorney General)

Manitoba Court of Appeal

December 30, 1991

The defendant attorneys general appealed a refusal by a motions court judge to order particulars of numerous allegations in a statement of claim. The Metis plaintiffs in the action sought to impugn the vires of twenty-one federal enactments, both statutes and orders, and nine provincial enactments. The motions court judge concluded that the Attorney-General for Canada was attempting to force the plaintiffs to supply as particulars the very evidence intended to be relied on at trial. The claim alleged breaches of fiduciary obligations.

R. v. McIntyre

Saskatchewan Court of Appeal

April 7, 1992

McIntyre was convicted of unlawful possession of wildlife, contrary to s. 31 of *The Wildlife Act*, a provincial statute. The court held that section 12 of the Natural Resources Transfer Agreement is the sole and exclusive "existing" source of the entitlement of Indians to hunt, trap and fish for food in Saskatchewan. Provincial action that has the effect of limiting the Indians' right to hunt for food as authorized by paragraph 12 is not controlled by the fiduciary duty owed by the Crown to Aboriginal peoples as set out in *R. v. Sparrow* – ie. such rights are not “existing aboriginal or treaty rights”. Leave to appeal to the Supreme Court of Canada was dismissed on December 10, 1992, and yet the issue of hunting rights under the NRTA was later considered by the Supreme Court of Canada in *Badger* in 1996, and the majority of the Court held that provincial hunting laws based on the NRTA are subject to the *Sparrow* justification test because treaty rights are not “merged and consolidated” in the NRTA.

Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)

Federal Court of Appeal

May 8, 1992

The tribal council sought to have a certain project subjected to a full environmental review. They brought an action in Federal Court in April 1988, but took no further steps after the defence was filed. The instant proceedings were commenced in October 1990 by originating motions for certiorari and mandamus against the execution of an Agreement, ministerial approvals, and orders-in-council, alleging breaches of fiduciary duties. Appeals were allowed granting a motion to strike the originating motions. The court did not discuss the content of the fiduciary duty of the Crown, and the actions were directed to the federal Crown in any event.

Montana Band v. Canada

Federal Court of Appeal

October 8, 1992

The appeals of the plaintiffs and third parties to overturn a decision of the motions judge refusing to strike the third party notice were dismissed. The Federal Court had jurisdiction over this matter which involved the issue of the relationship between Aboriginal peoples and the federal administration and government.

Eastmain Band v. Canada (Federal Administrator)

Federal Court of Appeal

November 20, 1992

In construing the meaning of the 1975 James Bay and Northern Quebec Agreement, the court held that the existence of the fiduciary relationship did not require every ambiguity in the agreement to be construed in favour of the Aboriginal parties must be tempered by the Crown's need to have other interests in mind. It must seek a compromise between that interest and the interest of the whole of society.

R. v. Vincent

Court of Appeal for Ontario

January 22, 1993

The accused was found guilty of unlawful importation of goods into Canada. The court held that the Jay Treaty was not a treaty within the meaning of s. 35 and did not provide the accused with the right to import goods without paying duty.

Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)

Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Application for leave to appeal dismissed February 4, 1993.

An Alcan project affecting two rivers was exempted by the Minister of the Environment from compliance with the Environmental Assessment and Review Process Guidelines Order. The tribal council questioned the validity of the exemption order because it breached the Crown's fiduciary obligation to assess the environmental impacts of the project on the Applicant's Aboriginal rights and interests. A motion to strike was granted by the Court of Appeal.

Blueberry River Indian Band v. Canada (DIAND)

Federal Court of Appeal

February 9, 1993

Several allegations of breach of fiduciary duty by the federal government in selling rather than leasing surrendered reserve lands were rejected, although the existence of the fiduciary relationship prior to the surrender of land was accepted. The majority did agree that a breach took place when the Crown failed to get an

appropriate price for the surrendered land that was sold, but then held that that claim was barred by the British Columbia 30-year ultimate limitation period. The dissent, however, accepted that a breach had occurred when the surrendered land was sold to Veterans' Affairs with mineral rights included and found that the circumstances were such that they amounted to an equitable fraud so that the limitation period did not preclude the claim. The case went on to the Supreme Court of Canada.

R. v. Lewis

British Columbia Court of Appeal
June 25, 1993

The Crown appealed the acquittal of the two accused of a breach of the federal Fishery Regulations. On appeal it was found that the Indian Band Bylaw which permitted fishing in the river to the centre line of the river was a complete defence. The two that were fishing on the reserve side were therefore acquitted. The further appeal was allowed. The jurisdiction of the Band council to make bylaws pursuant to section 81(1)(o) of the Indian Act was limited to the territory encompassed by the boundaries of the reserve. "On reserve" under that provision was not to be liberally interpreted to include adjacent waters. The Aboriginal right to fish included only the right to harvest such fish as the Band required for sustenance and ceremonial purposes. Any fiduciary obligations the Crown may have had were met by unimpeded access of Band to the fishery in the river and their priority in harvesting it.

R. v. Alphonse

British Columbia Court of Appeal
June 25, 1993

The accused appealed his conviction under the provincial Wildlife Act for hunting out of season. It was held on appeal that he had established a prima facie infringement of Aboriginal rights not justified by the Crown. The accused was exercising an unextinguished Aboriginal right. The *Wildlife Act* was a law of general application and was referentially incorporated by section 88 of the *Indian Act*.

R. v. Van der Peet

British Columbia Court of Appeal
June 25, 1993

The appellant was charged with selling 10 salmon caught under the authority of an Indian food fish licence, contrary to federal Fishery Regulations, which prohibited the sale or barter of fish caught under such a licence. The restrictions imposed by the Regulations were alleged to infringe the appellant's aboriginal right to sell fish and accordingly were invalid because they violated s. 35(1) of the *Constitution Act*,

1982. The Court of Appeal rejected the existence of a commercial right to fish. There is no discussion of the extent of the fiduciary relationship or the obligations that arise from it.

Delgamuukw v. British Columbia

British Columbia Court of Appeal

June 25, 1993

The Court of Appeal accepted the facts as found by the trial court, which declared that the plaintiffs had unextinguished and non-exclusive Aboriginal rights, other than ownership or property rights, in an area described by the court. However, their claim to ownership and jurisdiction was dismissed on the basis that any form of Indian self-government existing at the time British Columbia entered into Confederation, was superseded by the *Constitution Act*, as adopted by the Province. The court favoured a co-existence approach which would allow Indian culture to be preserved but ruled that native traditions, rules and regulations could not operate to the extent that they conflicted with the laws of the Province or of Canada. Thus, the claim that the Province's right to issue grants, licences, leases or permits was subject to the claim of Indian ownership and jurisdiction was dismissed. The only reference to the fiduciary relationship and the obligations of the Crown arising out of it was somewhat peripheral. The Court did observe that since the relationship in relation to the sale of their land provides a "guiding principle" for the application of s. 35 of the *Constitution Act, 1982*, then it must bear on the proper test to be applied to legislation purporting to extinguish Aboriginal title, because the honour of the Crown is engaged. The honour of the Crown, arising from its role as the historic protector of Aboriginal lands, requires a clear and plain intention to extinguish Aboriginal title that is express or manifested by unavoidable implication.

Enoch Band of Stony Plain Indians v. Canada

Federal Court of Appeal

November 18, 1993

On June 30, 1975, the Appellants, the Band commenced action against Canada alleging that a surrender of land obtained by the Crown in 1908 was improperly obtained and thereby void, or that the Band had suffered damages thereby. The Court allowed the Band's appeal from the court-ordered deletion from their claim of paragraphs alleging against the Crown a breach of fiduciary duty for failure to ensure that the Band received independent legal advice before the surrender and a breach of trust in relation to the handling of monies from the surrender against the Crown.

Skerryvore Ratepayers' Assn. v. Shawanaga Indian Band

Court of Appeal for Ontario

December 9, 1993

The plaintiffs sought a declaration that a road which ran through unsundered Indian land was a public road. The public had used the road from 1850 until 1978, when the Band took the position that the road was a private road. The trial judge declared the road to be a public highway by virtue of the common law doctrine of dedication and in addition, or in the alternative, by virtue of s. 257 of the *Municipal Act*, which provides that "all roads passing through Indian lands . . . are common and public highways". The Band's appeal was allowed on the basis that the doctrine of dedication is inapplicable to unsundered Indian land because it is impossible to infer an intention to dedicate. Section 257 of the *Municipal Act* cannot mean that roads on or passing through Indian lands become public highways by the simple operation of that section; that would be legislation in relation to a matter coming within the exclusive legislative authority of Parliament and, as such, would be *ultra vires*.

Ryan v. British Columbia (Ministry of Forests, District Manager)

British Columbia Court of Appeal (In Chambers)

February 1, 1994

An application to stay the operation of a cutting permit pending appeal was dismissed. The Gitksan contended that the cutting permit was issued without notice to them, and that it was invalid because it was issued without the consultation with them that is required by the rules of natural justice, the doctrine of administrative fairness and the doctrine of legitimate expectation. The chambers judge rejected all of these allegations, but said he "accepted" that the Gitksan are entitled to be consulted in respect of such activities because **the Forest Act itself and the fiduciary obligations toward Native Indians discussed in Delgamuukw, establish that right beyond question**. However, consultation did not work here because the Gitksan did not want it to work. The process was impeded by their persistent refusal to take part in the process unless their fundamental demands for control were met.

Quebec (Attorney General) v. Canada (National Energy Board)

Supreme Court of Canada

February 24, 1994

The Board was required to determine whether or not certain licences to export electrical power would be issued. The Court held that while there is a fiduciary relationship between the federal Crown and the Aboriginal peoples of Canada, the function of the Board is quasi-judicial and inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it. The fiduciary relationship between the Crown and the appellants does not

impose a duty on the Board to make its decisions in the appellants' best interests, or to change its hearing process so as to impose superadded requirements of disclosure.

R. v. Wolfe

Saskatchewan Court of Appeal

September 12, 1995

The accused was charged with trafficking in wildlife, contrary to provincial wildlife laws enacted further to the authority provided to the province in the NRTA. The charges resulted from a sting operation in which undercover officers brought liquor onto the reserve, which was a “dry” reserve. The court held that this use of alcohol in breach of the treaty cannot be justified by reference to principles of wildlife conservation. Sparrow and Bear Island require that this law enforcement be undertaken in a manner which fulfils the Crown's fiduciary obligations.

Blueberry River Indian Band v. Canada (DIAND)

Supreme Court of Canada

December 14, 1995

Action was taken against the federal Crown in relation to the inadvertent surrender of mines and minerals from reserve lands. The Court held that the Crown's fiduciary obligations in relation to surrenders extended only to the point of preventing exploitative bargains. However, the Crown's failure to reserve mines and minerals to the benefit of the Indian when the surrendered land was sold, contrary to the usual policy, was an error that the Crown had power to and should have rectified. Federal Crown found to have breached its fiduciary obligations to the Band in failing to rectify this error as soon as the error was discovered.

R. v. Jack

British Columbia Court of Appeal

December 20, 1995

The defendants appealed their convictions under federal fishery regulations for unlawfully fishing in an area and at a time not authorized by law. He possessed an Aboriginal right to fish, including the right to fish for food and social and ceremonial purposes in certain areas. He fished for salmon for his son's wedding in these areas at a time not authorized by law without a licence or permit. The trial judge found that a closure order, made for the preservation of fish, breached the defendant's constitutional right to fish and found him not guilty. This judgment was reversed on appeal. The Appeal Court Judge found *prima facie* infringement of the defendant's Aboriginal right to fish but concluded that there was a valid legislative objective for the infringement which was justified.

R. v. Little

British Columbia Court of Appeal

December 20, 1995

The defendant appealed from his conviction for fishing without a permit and unlawful possession of fish. At issue was whether conservation measures instituted by the Department of Fisheries and Oceans were constitutionally impermissible interferences with the defendant's treaty right to fish as a descendant of the signatories to the Douglas Treaty. The treaty included the areas on which the defendant fished. The trial judge held that there was a *prima facie* infringement of the defendant's treaty rights but that there was a valid legislative objective to the prohibitions with regard to retention and use of gill nets. The Court of Appeal allowed the appeal and acquitted the defendant. The allocation of priorities under the Regulations and policies did not comply with section 35(1) of the *Constitution Act, 1982*, in relation to the treaty right to fish. There was evidence from which it could be inferred that the policy adopted had the effect of accommodating the interest of the commercial fishery and the economic benefits brought to the Province by sports fishery at the expense of conservation and Aboriginal food fishing rights.

Canada (Attorney General) v. Fontaine

Manitoba Court of Appeal

February 15, 1996

This was an appeal by Fontaine, an agent for the Sagkeeng First Nation, from a decision allowing an application by the Attorney General to discharge a caveat. The caveat was filed with regard to a parcel of land. The First Nation claimed that the sale of the land which included the parcel, was in breach of the *Indian Act* and the fiduciary duty of the Crown. The motions judge concluded that the agent could not establish a *prima facie* case that the First Nation held an interest in the land. The appeal was dismissed. The claim to the land was speculative as revealed by the statement on the agent's affidavit that further research was required to determine whether the sale was invalid.

R. v. Badger

Supreme Court of Canada

April 3, 1996

The accused were charged with hunting out of season under provincial legislation. The Court held that the NRTA did not extinguish the treaty right to hunt for food. Absent direct conflict, treaty rights continue. The right to hunt for food referred to in the NRTA may therefore be different from one treaty to another. The geographical limitation on the existing hunting right should be based on a concept of visible, incompatible land use, consistent with the oral promises made to the

Indians at the time the Treaty was signed. Even though the provincial law is enacted under the authority of the NRTA, the *Sparrow* justification text must be met so that it is necessary for the Crown to prove more than that the legislation is for conservation purposes.

R. v. Lewis

Supreme Court of Canada

April 25, 1996

The Court held that even if the process of reserve allotment in British Columbia was to protect the prior rights of Indian nations by the establishment of reserves, the Crown did not breach its fiduciary duty, even if one existed at the time of allotment. Any fiduciary obligation on the part of the Crown to secure access to the fishery for the Squamish Indian Band was honoured by providing fishing stations for their use. The fact that the Crown did not secure a larger access to the fishery for the Squamish Indian Band, in addition to the fishing stations, did not amount to exploitation

R. v. Gladstone

Supreme Court of Canada

August 21, 1996

The accused were charged under federal fishery legislation with attempting to sell herring spawn on kelp caught without the proper licence contrary to s. 20(3) of the Pacific Herring Fishery Regulations. The appeal against conviction was allowed. The fiduciary relationship was referred to only in the connection with its requirement that priority be provided to Aboriginal fishing rights as an element of the *Sparrow* justification test.

R. v. N.T.C. Smokehouse Ltd.

Supreme Court of Canada

August 21, 1996

Charges were laid under federal fishery regulations. The Court did not discuss the fiduciary relationship because it found that there was no commercial right to fish established.

R. v. Van der Peet

Supreme Court of Canada

August 21, 1996

The case deals with federal fishery regulations and discusses extensively how to define an existing Aboriginal right and invokes the fiduciary relationship as the

reason why any ambiguity relating to the scope and application of s. 35 must be resolved in favour of Aboriginal peoples.

R. v. Adams

Supreme Court of Canada

October 3, 1996

Adams was charged with fishing without a licence on Lake St. Francis, Quebec, contrary to s. 4(1) of the Quebec Fishery Regulations. A special licence issued under ministerial permit authorizing native persons to fish for food may have been available under s. 5(9) but he did not apply for such permission. The appellant was convicted at trial and this conviction was upheld on appeal. The fundamental issue was whether Aboriginal rights are inherently based in claims to land, or whether claims to land are simply one manifestation of a broader-based conception of Aboriginal rights. The Supreme Court took the latter approach, based on the fiduciary relationship, holding that Parliament cannot adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights. The statute or its regulations must outline specific criteria for the granting or refusal of the discretion which seek to accommodate the existence of aboriginal rights. The absence of such criteria will result in the statute being found to represent an infringement of Aboriginal rights under the *Sparrow* test.

R. v. Côté

Supreme Court of Canada

October 3, 1996

The accused was charged and originally convicted of offences under federal fishery regulations and provincial wildlife legislation. The issue that arose was whether a provincial regulation infringing a treaty right to fish was of no force or effect given the overlapping statutory and constitutional protection extended to treaty rights from provincial legislation under both s. 35(1) of the *Constitution Act, 1982*, and s. 88 of the *Indian Act*. The provincial law that required the payment of a fee to enter certain controlled zones by vehicle was held not to infringe any Aboriginal or treaty right to fish because the accused could have gained access to the area by other means.

Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band

Federal Court of Appeal

November 20, 1996

The issues in this case was whether or not the provision of the *Indian Act* requiring persons who vote for Chief and Council to be ordinarily resident on the reserve was valid. An allegation that this provision on the Act was in breach of the Crown's

fiduciary obligations was not addressed, although it was described as novel.

Chippewas of Kettle & Stony Point v. Canada (Attorney General)

Court of Appeal for Ontario

December 2, 1996

The eventual purchasers of surrendered land were present at the meeting at which the land was surrendered to the federal Crown. The purchasers were permitted by the Indian agent to pay \$5 cash to each voting member in attendance and an additional \$10 subsequently. At the meeting, he had apparently offered to pay \$100 per acre, but, after discussions, he and the Band came to an arrangement in which he would pay \$85 per acre plus a \$15 bonus directly to Band members. This scheme was beneficial to the Band members because under the statutory scheme, the maximum sum that could be distributed would be 50 per cent of the sale proceeds after closing and after reductions for the Band's debts.

The Band sued the federal Crown, property-owners who owned the surrendered land, and others for a declaration that the surrender and the Crown patent were void. (The Band also sued for damages including a claim against the Crown for breach of fiduciary duty.) On a motion for summary judgment, Killeen J. dismissed the Band's claim for declaratory relief. The Band appealed and the appeal was dismissed.

The court held that the Band understood that it was surrendering to the Crown the reserve land and intended to do so. There was no evidence to suggest that the cash payments vitiated the true intent or the free and informed consent of the Band. However the band's claim of damages for a breach of fiduciary duty could be litigated.

R. v. Marshall

Nova Scotia Court of Appeal

March 26, 1997

The Court held that the accused had not established a treaty right to fish. There was no discussion of the fiduciary relationship.

Opetchesaht Indian Band v. Canada

Supreme Court of Canada

May 22, 1997

In 1959, the Crown, with the consent of the Opetchesaht band council, granted Hydro a right-of-way for an electric power transmission line across the band's reserve "for such period of time as the . . . right-of-way is required for the purpose of" a transmission line. The band applied to the Supreme Court of British Columbia

for a declaration that the *Indian Act* did not authorize the grant of a right-of-way for an indefinite period of time. The Court held that the permit was valid, despite the lack of a specific date for its expiration. There is no discussion of the fiduciary relationship.

Perry v. Ontario

Court of Appeal for Ontario

June 5, 1997

Perry was a non-status Algonquin Indian, charged with hunting and fishing offences. He challenged the constitutionality of those charges under s. 15(1) of the Charter, on the ground that Ontario's "Interim Enforcement Policy," which was designed as a step toward legislative recognition of constitutionally protected Aboriginal and treaty rights under *R. v. Sparrow*, discriminated against non-status Indians.

Smiahmoo Indian Band v. Canada

Federal Court of Appeal

June 24, 1997

Federal Crown obtaining absolute surrender of reserve land as needed to expand customs facilities. Most of surrendered land remaining unused for customs facilities, other public purpose for 40 years, but the Crown refused to return the land to the Band.

Samson Indian Nation and Band v. Canada

Federal Court of Appeal

October 27, 1997

The band sought disclosure of documents in an action relating to a surrender of reserve lands. The court held that the fiduciary relationship required disclosure of documents relating to the Crown's administration of its trust-like responsibilities.

Delgamuukw v. British Columbia

Supreme Court of Canada

December 11, 1997

In an action originally claiming ownership and control of a large area of the province, and converted to a claim for self-government, the court held that the provincial Crown has no jurisdiction to extinguish Aboriginal title as the power to extinguish between 1867 and 1982 falls within federal jurisdiction under s.91(24). The court discusses the scope of the fiduciary duty of the Crown in the context of justification.

Kitkatla Band v. British Columbia (Minister of Forests)

British Columbia Court of Appeal
June 25, 1998

This was an application by the Kitkatla Band for an interlocutory injunction. The Band brought a claim for Aboriginal title to Crown land. The respondent Minister of Forests licensed the respondent, Interfor, to harvest timber from the land. The Court refused a Band application for an interlocutory injunction barring Interfor from logging the land pending resolution of its title claim. The Band argued that the trees to be cut under the licence were evidence for its Aboriginal title claim. It applied to the Court of Appeal for an interlocutory injunction preventing logging activity pending resolution of its appeal from the refusal of the Court to grant the initial interlocutory injunction.

Canadian National Railway Co. v. Matsqui Indian Band

Federal Court of Appeal
July 2, 1998

These were appeals by the railway companies from applications to set aside property tax assessment notices. Property tax assessment notices were issued on behalf of various Indian bands in respect of lands held by a number of railway companies. Applications for judicial review were allowed, and the notices taxing the railway companies were set aside as being outside the taxing jurisdiction of the Indian bands. On appeal, the issue was whether the lands in question were lands in the reserve within the meaning of the *Indian Act* so to be subject to taxation pursuant to section 83(1)(a) of the *Indian Act*. The Court acknowledged that the fiduciary relationship affected the interpretation to be provided to the Act. Both Indian bands involved in the appeal understood and accepted that the lands in question had been surrendered absolutely for the construction of the railway. The surrendered lands were no longer part of the reserve, and the Indian bands could no longer effectively exercise their local government powers over the lands.

Imperial Oil Resources Ltd. v. Canada (Minister of Indian Affairs and Northern Development)

Federal Court of Appeal
November 16, 1998

The Samson Cree Nation brought a motion to be added as a party, appellant, or in the alternative, an intervenor, in an appeal from the following order made by a Motions Judge to quash a decision of the Minister under the Indian Oil and Gas Regulations. The relationship of the Samson Cree Nation and the appellant is that of beneficiary and trustee and the subject matter of the dispute between the parties to the appeal could affect the band's entitlement under certain oil and gas leases between the parties to the appeal. In other words, the financial interest of the

Samson Cree Nation could be affected by the outcome of this appeal. The court held that refusal of the motion to participate in this appeal would not result in any prejudice to the Samson Cree Nation, since the federal Crown has an obligation as trustee to protect its interest and, if it fails to discharge that obligation, the Samson Cree Nation has its remedy either in the ongoing litigation for breach of trust or otherwise at law or in equity.

Musqueam Indian Band v. Glass

Federal Court of Appeal

December 21, 1998

The case involved a dispute over the value of Indian land surrendered for lease. The fiduciary obligations of the federal Crown in dealing with surrendered lands for the benefit of the Indians is referred to.

Watt v. Liebelt

Federal Court of Appeal

December 30, 1998

An adjudicator under the *Immigration Act* determined that Watt could not stay in Canada because of certain criminal convictions, rejecting his claim that the Act infringed an Aboriginal or treaty right. The Court held that the mere fact of the enactment of the Act could not be taken to have extinguished a right. There were many other related issues concerning which the adjudicator did not have sufficient evidence to determine.

Osoyoos Indian Band v. Oliver (Town)

British Columbia Court of Appeal

May 4, 1999

The case considers the fiduciary obligations arising on surrender of reserve lands through an expropriation by Canada for provincial needs.

Canadian Pacific Ltd. v. Matsqui Indian Band

Federal Court of Appeal

June 25, 1999

Notices of assessment were issued pursuant to taxation by-laws made under *Indian Act* against Canadian Pacific with respect to rights-of-way traversing reserves in British Columbia. The fiduciary obligations arising out of the federal Crown's fiduciary relationship were referred to briefly.

Halfway River First Nation v. British Columbia (Ministry of Forests)

British Columbia Court of Appeal

August 12, 1999

The band challenged the issuance of cutting permits by provincial officials in respect of lands comprising their traditional hunting areas on the basis that the issuing of the permits infringed their treaty right to hunt. The Court held that a treaty right to hunt did exist and was infringed, but the majority were of the view that the provincial officials were required to engage in consultation in order to justify infringing actions.

Roberts v. Canada

Federal Court of Appeal

October 12, 1999

Two bands brought actions against the federal Crown in respect of the allocation of certain reserve lands to each. The court held that there was no breach of any fiduciary obligation established.

R. v. Marshall

Supreme Court of Canada

November 17, 1999

The accused, a Mi'kmaq Indian, was fishing with prohibited net a during close period and selling fish caught without a licence in violation of federal fishery regulations. The Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown. The Court held that Marshall had established a treaty right to maintain a small scale eel fishery and the Crown had made no effort to justify its infringing legislation.

R. v. Marshall

Supreme Court of Canada

November 17, 1999

MOTION FOR REHEARING AND STAY

The motion for a rehearing was made by one of the interveners, the West Nova Fisherman's coalition, who were seeking a further trial on the issue of whether or not the infringing legislation could be justified on grounds other than conservation. The Court held there were no grounds on which to grant the application. However, the Court went on to point out that although in this case the Crown chose not to attempt to justify its legislation, that should not be interpreted as a blanket statement that no limitations on Aboriginal fishing rights were possible.

Bear Island Foundation v. Ontario

Ontario Court of Appeal

November 15, 1999

The Supreme Court of Canada had previously decided that any interest the Indian plaintiffs had in lands in northern Ontario had been extinguished by the Robinson Huron Treaty. The Court of Appeal now held that the proper interpretation of the Supreme Court's decision was that breach of the Treaty could preserve only a claim to compensation or related relief, but not an interest in the land. Bear Island and the others had asserted one theory in the Bear Island case, that of Aboriginal title. They could not now assert new theories, as *res judicata* applied to the new theories. Even if *res judicata* did not apply, the parties had agreed that the Bear Island Case would decide the outcome of the caution appeals.

Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)

Federal Court of Appeal

November 17, 1999

The appellants sought to set aside the Minister's decision to lease land on an Indian reserve. The Court held that the Crown was under no fiduciary obligation to Indian band when acting under s. 58(3) of the *Indian Act* and had to assess competing interests among band members.

Ross River Dena Council Band v. Canada

Yukon Territory Court of Appeal

December 15, 1999

The Band Council claimed that no tobacco tax was payable on reserve. The issue whether certain lands were "reserve lands" within the meaning of the *Indian Act*, so that the provisions of section 87 of that Act respecting taxation applied to result in a tobacco tax under territorial legislation being not applicable on the "reserve". The Court referred to the fiduciary relationship as guiding its interpretation of the Act.

Transcanada Pipelines Ltd. v. Beardmore (Township)

Ontario Court of Appeal

April 5, 2000

The case involved an appeal from a judicial review application concerning an order to amalgamate certain municipalities under provincial law. The Court of Appeal rejected the trial judge's holding that the commission that made the amalgamating order had an obligation to consult with First Nations within the municipalities,

pointing out that such an obligation only arose when it was established that an Aboriginal or treaty right was infringed.

Kitkatla Band v. British Columbia (Small Business, Tourism and Culture)

British Columbia Court of Appeal

January 19, 2000

An action was brought against a provincial official charged with the responsibility of issuing permits to cut down “culturally modified trees”. Issues included the question of whether provincial heritage legislation authorizing such permits was valid provincial legislation. The majority of the court held that the legislation was valid because it was not “in relation to Indians”. Prowse, J.A. dissented, concluding that the legislation was in pith and substance in relation to the core of Indianness and therefore invalid. A second issue was whether or not the issuance of such a permit derogated from Aboriginal rights, contrary to section 8 of the provincial Act (similar to section 25 of the Charter). The majority held that the section did not require the Minister to determine what Aboriginal rights existed, but only that Aboriginal rights once established were protected.

The only reference to “fiduciary” occurs in paragraph 90 where Braidwood JA refers to the argument made by the Band that the Minister should first determine the scope of the asserted Aboriginal rights and then act to protect them, as required by section 8. Braidwood quotes from *R v. Adams*, although *Adams* dealt with a breach of federal fishery regulations, not a provincial law. Braidwood made no reference to this different context.

Chippewas of Sarnia Band v. Canada (Attorney General)

Ontario Court of Appeal

January 27, 2000

An application by the Chippewas of Sarnia Band to quash an appeal brought by Ontario and a cross-appeal by Canada was dismissed. The Chippewas maintain that their Aboriginal title and treaty rights in the disputed lands were never surrendered. They were seeking a declaration that their title to the disputed land was never extinguished and that they have the exclusive right to occupy, enjoy and possess the lands. They also sought damages from Ontario and Canada for breach of fiduciary duty, breach of treaty obligations and conversion.

Animal Alliance of Canada v. Canada (Attorney General)

Federal Court of Appeal

September 7, 2000

An appeal was taken from a decision dismissing most aspects of the appellants’

challenge to the validity of the March 25, 1999 Regulations Amending the Migratory Birds Regulations, which extended the hunting season for certain geese. The stated reason for the regulation was to check what the government experts believed was an overabundance of snow geese. Representatives of the Dene nation asserted that “the Canadian Wildlife Service is in violation of treaty rights by advocating measures that directly impact on our communities without adequate and proper consultation with aboriginal people as required under judicial law.”

Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)

British Columbia Court of Appeal

September 26, 2000

The band attempted to register *lis pendens* against land that was subject to its claim of Aboriginal title. The Court held that such interests could not be protected in the land titles system. There was no discussion of the fiduciary relationship.

APPENDIX C

Saskatchewan Aboriginal Fiduciary Cases

Lac La Ronge Indian Band v. Canada

[1999] S.J. No. 773

999 SKQB 218

Q.B. No. 2655 of 1987 J.C.S.

Saskatchewan Court of Queen's Bench

Judicial Centre of Saskatoon

Gerein J.

November 30, 1999.

The Court concluded that it was not necessary to decide the issues in question in this case on the fiduciary relationship, which he characterized as being “between Canada and Indian peoples”. He held that the land in question either passed to Saskatchewan, which would not result in a fiduciary relationship arising because “all the characteristics are not present” in that “Canada does not possess an exclusive power or discretion”. The other possibility was that the land remained with Canada, but in that case Canada’s failure to create the reserve was a breach of the Treaty, not a breach of a fiduciary obligation.

R. v. Bear Claw Casino Ltd.

[1994] S.J. No. 485

Saskatchewan Provincial Court

Carlyle, Saskatchewan

Goliath Prov. Ct. J.

October 4, 1994

The accused were charged with *Criminal Code* offences relating to illegal gambling. The Court did not rule on defences based on s. 35 but acquitted the accused on the basis of reasonable doubt.

R. v. Catarat

[1998] S.J. No. 601

Saskatchewan Provincial Court

Buffalo Narrows, Saskatchewan

Nightingale Prov. Ct. J.

August 26, 1998.

Five members of the Buffalo River Dene Nation flew to Watapi Lake, in the Cold Lake Air Weapons Range, in order to hunt. They were charged with unlawfully entering a controlled access area, namely the Cold Lake Air Weapons Range,

contrary to Section 4 of the *Defence Controlled Area Regulations* and Section 288 of the *National Defence Act* and also with a contravention of the provincial *Wildlife Act*. Saskatchewan conceded that the only reason that the accused were or could be guilty of a breach of the provincial legislation was because they were forbidden by Canada to hunt on the Range. The judge held that their right to hunt under Treaty 10 was infringed. He also held that the infringement was not justified because there was no valid legislative objective and the honour of the Crown was not maintained by charging these accused while permitting others access to the Range to hunt.

R. v. Catarat

[1999] S.J. No. 612

1999 SKQB 28

Q.B.A. No. 19 of 1998 J.C.B.

Saskatchewan Court of Queen's Bench

Judicial Centre of Battleford

Krueger J.

August 25, 1999

The Court held that it is settled law that a treaty will be modified to the extent that the NRTA evinces a clear intention to effect such a modification. The issue was whether the Range was unoccupied Crown land within the meaning of the NRTA. The Court held that it was not, but went on to find that the accused may have had implied permission to hunt there and referred the matter back to the trial judge to hear further evidence on this point.

R. v. Coullonneur

[1996] S.J. No. 305

DRS 96-14311

Saskatchewan Provincial Court

Judicial District of Beauval

Nightingale Prov. Ct. J.

May 28, 1996

The accused was charged with fishing with a gill net smaller than allowed under the Regulations under the federal *Fisheries Act*. He argued that the Regulations were an unjustified infringement of his right to fish as guaranteed under section 35 of the *Constitution Act*. The Court held that because the Government had organized management of the fishery in a manner giving priority to Aboriginal fishing rights - by clearly reserving to them status as "first users" of the fishery - it had honoured its fiduciary duties.

R. v. Ironeagle

[1999] S.J. No. 737

Saskatchewan Provincial Court
Fort Qu'Appelle, Saskatchewan
Moxley Prov. Ct. J.
November 8, 1999.

The accused was charged with several violations of *The Fisheries Regulations* made under *The Fisheries Act, (Saskatchewan) 1994*. The charges were dismissed based on an entrapment defence.

R. v. Janvier

[1995] S.J. No. 796
DRS 96-16058
Saskatchewan Provincial Court
Meadow Lake, Saskatchewan
White Prov. Ct. J.
July 27, 1995.

The accused was hunting for food on Crown land. owned by the Crown in an area that formed part of a traditional native hunting ground. Janvier was a member of a band which was permitted by treaty to hunt on unoccupied Crown land. The Crown alleged that Janvier had hunted on occupied Crown land. The land was leased to ranchers for grazing purposes. Janvier argued that the land was unoccupied. Guided in its interpretation by the fiduciary relationship and the obligations arising out of it and following *Badger*, the Court held that the lands were not occupied because they were not actually or visibly in use.

R. v. Keepness

[1999] S.J. No. 869
Saskatchewan Provincial Court
Saskatoon, Saskatchewan
Smith Prov. Ct. J.
December 17, 1999

The accused was charged with trafficking in wildlife, contrary to provincial legislation. The Court held that since the sale of deer meat took place on reserve, the *Indian Act* applied, not provincial law.

R. v. McIntyre

[1990] S.J. No. 694
Saskatchewan Provincial Court
LaRonge, Saskatchewan
Fafard Prov. Ct. J.
November 20, 1990.

A Treaty Indian was charged with offences related to hunting in violation of the Saskatchewan *Wildlife Act* and its regulations. The treaty right to hunt is limited by the NRTA to the right to hunt for food only. The question at issue was whether or not the Crown, in creating the Road Corridor Game Preserve, occupied the land in a constitutionally valid manner, that is, respecting the fiduciary duty of the Crown towards the Indians. The Court found that there had been no consultation with the Indians of the band in planning the game preserve and no priority given to their hunting rights. Therefore the Court found that the infringing legislation was not justified.

R. v. Morin

[1996] S.J. No. 262

DRS 96-11555

Saskatchewan Provincial Court

Judicial District of Buffalo Narrows

Meagher Prov. Ct. J.

April 24, 1996

The accused were charged with several violations of the Saskatchewan Fisheries Regulations made pursuant to the Fisheries Act R.S.C., c. F-14. The Court found that as Métis they had an Aboriginal right to fish and that the legislation was an infringement of their right to equality under the law as guaranteed by Section 15(1) of the Charter, with the result that it has no force or effect as against the Defendants.

R. v. Morin

[1996] S.J. No. 888

DRS 97-13479

Q.B.A. No. 11 of 1996 J.C.B.

Saskatchewan Court of Queen's Bench

Judicial District of Battleford

Krueger J.

December 13, 1996.

Leave was granted to the Métis Nation of Saskatchewan and the Métis Nation of Canada to intervene on the Crown's appeal of an acquittal of a hunting charge based on an Aboriginal right to hunt. The issues involving the scope of the Crown's fiduciary duty justified allowing the applicants to intervene.

R. v. Morin

[1997] S.J. No. 529

DRS 97-14386

Q.B. No. 11 of 1996 J.C.B.

Saskatchewan Court of Queen's Bench

Judicial Centre of Battleford
Laing J.
September 8, 1997

Morin and Daigneault were Metis charged with six fisheries offences. They were acquitted at trial of certain of the charges on the basis that they had an Aboriginal right to fish. They claimed that the Saskatchewan Fishery Regulations infringed this constitutional right. The Crown appealed the acquittals. The court held that the accused had a right to fish for food, which was infringed and not justified.

R. v. Wolfe

[1995] S.J. No. 501
DRS 95-20409
Appeal File No. 6003
Saskatchewan Court of Appeal
Vancise, Gerwing and Jackson JJ.A.
September 12, 1995.

The accused was charged with trafficking in wildlife, contrary to provincial wildlife laws enacted further to the authority provided to the province in the NRTA. The charges resulted from a sting operation in which undercover officers brought liquor onto the reserve, which was a "dry" reserve. The court held that this use of alcohol in breach of the treaty cannot be justified by reference to principles of wildlife conservation. Sparrow and Bear Island require that this law enforcement be undertaken in a manner which fulfils the Crown's fiduciary obligations.

Yellow Quill First Nation v. Saskatchewan (Minister of Environment and Resource Management)

[1999] S.J. No. 712
1999 SKQB 82
Q.B. No. 1910 of 1999 J.C.S.
Saskatchewan Court of Queen's Bench
Judicial Centre of Saskatoon
Krueger J.
September 20, 1999

Yellow Quill First Nation applied ex parte for an order staying the operation of the forest management agreement between the respondents, the Minister of Environment and Resource Management and SaskFor MacMillan Limited and for an interim injunction restraining SaskFor from logging a disputed, identified 46,080 acre parcel of land. The interim application dealt with the narrow issue of the stay/injunction.

Yellow Quill claimed the disputed area as traditional, sacred territory. It advanced

contractual, Aboriginal and treaty rights to the disputed area and alleged that the Crown had breached its fiduciary duty in not dealing with Yellow Quill in a fair and honourable manner.

The court accepted that there was a serious case to be tried in these allegations, but there was not a sufficient foundation for an interim injunction.